Matrimonial Property Law
from a Comparative Law Perspective*
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* Huwelijksvermogensrecht in rechtsvergelijkend perspectief
1. General

1.1. Sources of matrimonial property law.

Outline. In most examined systems matrimonial property law has been codified. In Denmark and England, however, specific legislation is the principal source of matrimonial property law. In all systems judge-made law or case-law plays an important role to a varying degree. With the exception of English law, all examined systems of matrimonial property law have undergone major changes since the end of the Fifties.

Codification. In a majority of the examined systems matrimonial property law has been codified. The principal source of matrimonial property law in Germany, France and Italy is the codified private law laid down in the Bürgerliches Gesetzbuch (BGB), the Code civil (CC) and the codice civile (c.c.). In Sweden matrimonial property law was enacted in a separate Code of Matrimonial Law (Aktenskapsbalken).

Separate legislation. In Denmark and England, on the other hand, the principal source of matrimonial property law is to be found in specific legislation. In Denmark there are mainly three Acts of particular interest: the Act no. 56 of 18 March 1925 (Ægteskabsloven 2: Marriage Act II (MADk II)) regulating the consequences of a marriage, the Act no. 256 of 4 June 1969 (Ægteskabsloven Marriage Act I (MADk I)) regulating the solemnisation and dissolution of marriages and the Act no. 155 of 30 November 1974 (Skifteloven: Division Act (DADk)) regulating the partition of deceased’s estates and community of property. In England the following Acts are to be mentioned in particular: the Married Woman’s Property Act of 1882, the Family Law Act of 1996 and the Matrimonial Causes Act of 1973.

In countries in which codified law constitutes the principal source of matrimonial property law specific Acts and Ordinances may also be of importance. For example, Italy has a Divorce Act, Germany the Verordnung über die Behandlung der Ehewohnung und des Hausrats and France specific Acts forming part of the Code de commerce\(^1\).

\(^1\) The Code de commerce is not a real Code but consists of various Acts.

II. Comparison
Judge-made law. Judge-made law or case law also plays an important role, to a varying degree, like in England where in situations in which legislation provides no solution, the courts must have recourse to judge-made law (Common law). In particular the legal concept of trust plays an important role in determining matrimonial property rights.

It is further to be noted that under English law the courts have wide discretionary powers when deciding on the adjustments of the matrimonial property rights when the marriage has ended. Also the Swedish and Danish courts have such (but a more limited) discretionary powers. In these countries case-law as developed on account of these judicially discretionary powers is therefore essential.

Revisions of the law. With the exception of English law, all examined systems of matrimonial property law have undergone considerable changes since the end of the Fifties. German matrimonial property law was completely revised in 1957. In France matrimonial property law was revised in two stages: the first amendment of the law took place in 1965 and the second in 1985. In Italy a revision of family law took place in 1975. These revisions of the law served principally to ensure the equality and independence of husband and wife. Danish matrimonial property law was considerably changed in 1990, while Swedish matrimonial property law was amended in 1987.

At this time (Autumn 1999), changes have been initiated in a number of systems. The Danish and English legislators are both working on draft-Bills for the division of pension rights at the end of a marriage and in France the work focuses on a revision of the regulation of the prestation compensatoire.

1.2. Does the law, whether or not on a mandatory basis, permit the choice between two or more different statutory systems of matrimonial property law? What are these systems? And how must such a choice be expressed?

Outline. Germany, France and Italy also have several different matrimonial property law systems (optional systems) aside from the statutory system which will apply to the extent the spouses did not otherwise agree by marriage contract.

Sweden and Denmark, on the other hand, have, aside from the statutory system, no other optional systems. Under English law the situation differs completely from the other examined
systems: under English law there is neither a statutory system nor are there any other systems of matrimonial property law.

**Statutory system and optional systems.** Under the German *BGB*, the French *Code civil* and the Italian *codice civile* there are also several optional systems of matrimonial property law, aside from the statutory system governing the marriage of the spouses, to the extent the spouses did not otherwise agree by marriage contract. Specifically, all three systems permit election of a system of exclusion of any community of property (Germany: *Gütertrennung*, France: *séparation*, Italy: *separazione dei beni*), while France and Germany, in addition, allow the election of a system of general community of property (Germany: *Gütergemeinschaft*, France: *communauté universelle*). In Italy, on the other hand, general community of property is not included as a statutory optional system.² Only French law provides for a third separate regime: the system of *participation aux acquêts*. Both the *Code civil* and the *codice civile* provide for several other forms of community of property. However, in most cases these are constructions contracted by the spouses which are complementary to the statutory system. For example, the *codice civile* permits the spouses, in addition to the *communione legale* or the *separazione dei beni*, to elect a *fondo patrimoniale* (capital fund).

In none of these countries are the spouses obliged to make a choice between these systems.

**Sole statutory system.** Under Swedish and Danish law there are no other optional systems aside from the statutory system. However, the spouses may derogate from the rules on the composition of each one’s separate capital which they have according to the statutory system. In Denmark the composition of the separate capital may be made dependent on the manner in which the marriage is dissolved.

**Neither a statutory nor optional systems.** Under English law there is no statutory system nor are there any other systems of matrimonial property law. In principle, no distinction is made between the property rights position of spouses and of unmarried persons.

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² In Italy it is not permitted to contract a general community of property: a number of assets must remain private.
1.3. Which matrimonial property law will apply when the spouses were married without any provision in this respect? Are the spouses informed in any way of the property law consequences of their marriage?

Outline. With the exception of England, all examined legal systems have a statutory system of matrimonial property law which applies when the parties were married without having made other provisions. In none of the systems there are specific provisions pursuant to which future spouses will be informed of the consequences of their marriage.

Statutory systems. In France and Italy the statutory system consists of a limited matrimonial community of property regime (France: communauté des acquêts and Italy: comunione legale). The German statutory system, on the other hand, even though its name may give rise to a different assumption, is one of exclusion of any community (Zugewinngemeinschaft). In Denmark and Sweden an intermediate solution was chosen: the system of a so-called deferred community of property which excludes community of property during the marriage in combination with community of property arising at the end of the marriage.

England. In England the rule is that the matrimonial property rights are not affected by the marriage. In England spouses may therefore be considered as married under a regime of total exclusion of any community of property.

Information. None of the systems require that specific information on the consequences of their marriage be given to future spouses. In Germany, France and Italy only spouses who on their own initiative consult a civil law notary will be so informed. In England and under the Scandinavian systems the concept of 'civil law notary' is not known. Nevertheless, in the opinion of jurists from the respective examined countries, future spouses will, generally, be reasonably aware of their legal position. Only lawyers in England draw attention to the ignorance and misunderstandings as regards the statutory system.

1.4. What must spouses do when they wish to regulate their property law relationship?

Outline. Different from in England, special rules apply in all studied continental systems as regards contracts entered into by the spouses in respect of their property rights.
In all studied continental systems (Denmark, Germany, France, Italy and Sweden) spouses may enter into a marriage contract governing their property rights during the marriage and at its dissolution. In all these systems the rule is, however, that (future) spouses do not have unrestricted autonomy. Aside from specific requirements as regards the form of their marriage contract, (future) spouses must also keep account of restrictive provisions as regards the contents of their contract.

English law does not provide for similar rules. In England, matrimonial contracts are, in principle, subject to general contract law.

**Form of marriage contracts.** In Germany, France and Italy marriage contracts must be agreed before a notary. In Italy there is an exception to this rule when the spouses elect the regime of total exclusion of community of property, which choice need not necessarily be laid down in a notarial instrument. At the time of their marriage the spouses can make a declaration before the person who solemnises their marriage, which must then be annotated on the marriage certificate.

The concept of 'notaries' is unknown in the Scandinavian legal systems. As a result there is also no requirement of a notarial instrument. Marriage contracts, which must be in writing, must be signed by both parties. In principle, the parties could therefore draw up their marriage contract themselves, although, in practice, they will often instruct a lawyer to do so.

Under all continental systems marriage contracts made in breach of the aforementioned procedural provisions will, in principle, be null and void.

**Publication of marriage contracts.** All studied continental systems provide for rules on publication of marriage contracts for the protection of third persons. In France the spouses, when their marriage is solemnised, must state before a Registrar of Births, Deaths and Marriages whether they did or did not make a marriage contract. This statement is laid down in the marriage certificate. Specific additional other rules will apply for spouses engaged in business. In Italy the existence of a marriage contract is also annotated in the margin of the marriage certificate. For the contents of their marriage contract spouses themselves must be asked for information. In Denmark and Sweden marriage contracts must be registered at a district court which will then procure registration in a national register. In Germany marriage contracts must be registered in the Güterrechtsregister. However, this does not seem to take place often.
In addition, in all continental countries marriage contracts relating to **immovable assets** must be registered in an immovable property register. The general requirements for publication in the immovable property register will then apply. In Italy, however, there is no agreement on the nature of registration in an immovable property register. According to the governing doctrine such registration is not necessary in order to raise such marriage contracts against third persons.

Under all continental systems, when the publication requirements were breached, the marriage contract may not be raised against third persons, in principle, unless the latter were otherwise aware of the existence of the marriage contract, so that the third persons may then assume that the spouses were married under the statutory system.

**Persons without legal capacity and marriage contracts.** In Germany, France and Italy there are special rules in respect of the question of legal incapacity to act in connection with the making of marriage contracts. In France and Italy a minor who obtained consent for contracting a marriage may enter into a marriage contract, but if not yet declared of age, the minor must then be ‘assisted’ by the person who is authorised to give consent for the marriage.

German law goes further: a future spouse with limited legal capacity must not only be assisted but will need consent from his or her legal representative for making a marriage contract and, in certain circumstances, even the approval from the *Vormundschaftsgericht*. In principle, the representative does not have the right to enter into the marriage contract.

In France and Italy further specific rules apply for (future) spouses for whom an administrator was appointed. Under French law the same rules apply in respect of persons over whom a curator was appointed. Under Italian law, however, persons over whom a curator was appointed on account of a mental disorder are not permitted to marry. For that reason there are only specific rules in Italy for spouses over whom a curator is appointed after their marriage and who, during their marriage, wish to enter into a marriage contract.

Under all three systems the rule is that marriage contracts entered into by a person without legal capacity in breach of the aforementioned rules may be declared null and void on the application of the person without legal capacity (as soon as he or she will have legal capacity) or at the request of the legal representative.

**Making or altering marriage contracts during the marriage.** In all studied continental systems, (except under the French and, in two special cases, under the Italian system) no
specific requirements need to be fulfilled by spouses who wish to enter into a marriage contract during their marriage or wish to alter the provisions made in their marriage contract before they were married.

Also under Italian law, except in two cases, no specific requirements need be fulfilled. The one case which constitutes an exception is the case of a variation of the contents of a marriage contract without election by the spouses of the unaltered statutory system. The second exception concerns the case of a spouse who dies after having expressed the wish to alter the marriage contract. In the first case the spouses need consent from the parties which were involved in the contract. In the second case the courts must validate their marriage contract.

In France, however, the spouses must obtain court consent in all cases of alteration, while a variation will only be possible if the preceding matrimonial property regime had been in force for two years. Both the petitioned alteration and the court decision in respect thereof must be published.

For the rest, under all studied continental systems new marriage contracts must meet the same formal requirements and must be published in the same manner as contracts made prior to the marriage.

The contents of marriage contracts. As regards the contents of marriage contracts, under the studied legal systems the spouses are autonomous, to a certain extent. In Sweden the spouses only have the possibility to alter the composition of each spouse’s present capital. In their marriage contracts (future) spouses may provide that assets which by law are deemed private will fall in the deferred matrimonial community of property and, conversely, that community assets will constitute the private property of either spouse. In Denmark the spouses have more possibilities: they may provide that the composition of their respective capital will depend on the manner of dissolution of their marriage. For this purpose there are two constructions: skilsmissesæreje and fuldsændigt særeje. In the first case assets in respect of which skilsmissesæreje was agreed will only constitute joint community property if the marriage is dissolved by the death of either spouse and, in the second case, assets for which fuldsændigt særeje was agreed will always remain private irrespective of the ground for dissolution of the marriage. It is possible to decide on skilsmissesæreje or fuldsændigt særeje in respect of all assets or to elect a different construction in respect of specific assets and an other construction for other assets (possibly with, as third category, assets which will always form part of the joint matrimonial property).
In the other studied continental systems (Germany, France and Italy) the spouses will be free to elect one of the statutory systems and, when they so wish, they may derogate from any non-mandatory rules. For example, they may choose to exclude any community of property or adjust the rules of the statutory system for managing and administering assets. However, all studied continental systems provide, aside from a provision that marriage contracts may not be in breach of good morals and public policy, a number of mandatory rules from which there may be no derogation.

France and Italy have a whole catalogue of rules as regards the rights and duties of spouses from which no derogation may be made (the so-called ‘primary regime’). Spouses in France may also not derogate from the rules with regard to parental authority, the administration of the capital of their child, guardianship and the prohibition to enter into contracts in respect of future deceased’s estates. In Italy, aside from the requirement that there may be no derogation from the primary regime, there are statutory rules that no variation may be made in the power to manage and administer the assets and from the rule that the division and partition of the community must be made in equal portions.

In France and Italy specific earlier types of matrimonial property regime are expressly prohibited by law. For example, spouses in France may not elect the dotal system or the so-called ‘system without community’, as these systems are contrary to the principle of non-discrimination. For the same reasons the dotal system and similar systems are expressly forbidden in Italy. In Italy, moreover, it is not permitted to contract a general community of property: a number of assets must always remain private. In Germany it is not permitted to provide in marriage contracts that they will be governed by law which no longer is in force or by foreign law. Reference to foreign law (or to custom) is permitted in Italy under specific conditions. The contents of the foreign law (or of the custom) must be set out in the marriage contract.

In France and Italy it is possible to agree to a system with provisions wholly of one’s own choice. In contrast, in Germany the governing doctrine is that spouses must have a possibility to derogate from the systems of the BGB provided the final result corresponds with the provisions outlined in the BGB. A system wholly of one's own choice is therefore excluded. In Italy the learned authors differ: some consider a choice of a system wholly consisting of provisions of the own choice of the spouses possible while others do not believe this to be possible.

Otherwise than in France it is possible in Denmark, Sweden and Germany to provide that marriage contracts will be subject to a time clause. In France this is forbidden.
Under all studied continental systems the rule is that a contract will be null and void in principle, if the parties acted contrary to substantive restrictive provisions. Depending on the specific circumstances it will, however, be possible to only strike specific provisions so that the marriage contract will remain binding for the remainder.

**England.** In England the spouses have the possibility, based on the autonomy of the parties, to enter into contracts governing their property rights, both prior to and during the marriage,. However, it is difficult to compare such contracts with continental marriage contracts, because, on the one hand, their contracts need not fulfil special requirements as they are governed by the general rules governing the law of property, rights and interests and, secondly, because the courts have wide discretionary powers to amend, or derogate from, such contracts when deciding on the partitioning of marriage-related assets.

*Costs connected with making marriage contracts*

<table>
<thead>
<tr>
<th>Country</th>
<th>Average costs connected with making marriage contracts</th>
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<tr>
<td>Denmark</td>
<td>Costs depend on the elected provisions. For <em>fulstændigt særeje</em>: ± NLG 1,700</td>
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<tr>
<td>Germany</td>
<td>Costs depend on the type of marriage contract and the own capital of the spouses</td>
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<tr>
<td>England</td>
<td>Not applicable</td>
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<tr>
<td>France</td>
<td>Average costs between NLG 350 and NLG 650</td>
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<td>Italy</td>
<td>NLG 45</td>
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<td>Sweden</td>
<td>Average costs between NLG 400 and NLG 500</td>
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II. Comparison

1.5. Statistical figures

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<tr>
<th></th>
<th>Denmark (x 1000)</th>
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3 Figures for the entire UK.
2. Rights and powers of the spouses

Three types of system. The rights and powers of the spouses largely depend on whether or not there is a community of property during and/or after dissolution of the marriage. For that reason it is useful to keep in mind that the studied systems can be classified in one (or two) of the following three types: 1. systems without any matrimonial community of property (Germany and England), 2. systems with a matrimonial community of property during the marriage (France and Italy) and 3. systems with a deferred matrimonial community of property which will arise only after dissolution of the marriage (Denmark, Sweden and Italy). The Italian system provides both for a matrimonial community of property during the marriage and a community which will arise only on dissolution of the marriage.

2.1. What distinct different types of capital are there for married persons?

Outline. In the systems with matrimonial community of property during the marriage (France and Italy) the capital of the spouses consists of three types: the capital of each of the spouses and the joint capital. In the other studied systems there are, in principle, two different types of capital: that of the husband and that of the wife.

In systems with community of property during the marriage (France and Italy) there is a presumption of joint ownership. However, in nearly all other systems a distinction is made also as to a number of situations where there is a presumption of co-ownership.

In Denmark, France, Italy and Sweden claims for equalisation may arise after dissolution of the marriage of the private capital and the (deferred) matrimonial community of property. Claims between the private capital are not regulated by matrimonial property law but by the general law governing property, rights and interests. This also applies for claims arising in Germany for equalisation of the own capital of the spouses. In situations in which equalisation claims arise in the other considered legal systems, certain trust relations between the spouses arise under English law on account of the rules of *Equity*. The manner in which such equalisation claims must/can be satisfied differs in each of the studied systems.

The question when assets will form part of the community of property when they are purchased with means stemming from different private capital will not arise in systems
without any community of property. Of the other legal systems only the French system provides specific regulations for these issues.

**Three types of capital: joint capital and the private capital of each of the spouses.** In systems with matrimonial community of property during the marriage (France and Italy) matrimonial community of property arises by law when the spouses are married. The assets of the spouses are divided into three types of capital: the private capital of each of the spouses and the joint capital. Each spouse will remain the independent owner of the capital contributed to the marriage and the capital acquired during the marriage under inheritance law and from gifts and of determinate other assets which are expressly classified by law as private assets. All remaining assets acquired during the marriage fall in the matrimonial community, in principle. Different from French law, Italian law makes an exception for income from labour and that from private capital: during the marriage these assets form part of the spouses' private capital. Only after dissolution of the marriage and only if not consumed, these fall in the so-called ‘remaining’-community property.

**Separate capital: private capital of the husband and private capital of the wife.** Conversely, a marriage entered into in systems without community of property during the marriage (Denmark, Germany, England and Sweden) will not directly affect the matrimonial property position, as each spouse will remain the independent owner, in principle, of the capital acquired during the marriage and contributed at the time of the marriage. In principle, there are therefore two forms of separate capital: that of the husband and that of the wife. In these legal systems it is, however, possible to jointly purchase or acquire assets during the marriage, in which case both spouses will become co-owners and the general rules of the law of property, rights and interests apply.

**Presumption of joint ownership.** In systems with community of property during the marriage there is a presumption of joint ownership: except for proof to the contrary, assets will be deemed to belong to the matrimonial community. However, also in nearly all systems without community of property during the marriage (Germany, England and Sweden), a distinction is made in situations where a presumption of co-ownership exists. In Germany

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1 It is to be noted that in Denmark and Sweden, on dissolution of the marriage, a community of property will arise and that in England the courts have a discretionary power to make adjustments on the division of the property after a dissolution of the marriage.
there will be such a presumption in respect of household effects. In England both spouses are deemed joint-owners of the unspent part of the household allowance while a spouse who substantially contributed to the improvement of property will acquire an interest (or larger interest) in such property. In addition, a spouse may become co-owner, both in England and in Sweden, when he or she, more or less directly, contributed to the purchase price paid for an asset which belongs to the capital of the other spouse.

Claims for a compensatory adjustment between the private capital and the community property. In systems with a (deferred) community (Denmark, France, Italy and Sweden) claims for an adjustment between the private capital and the (deferred) matrimonial community may arise after dissolution of the marriage\(^2\). Claims for adjustment arise in these systems as a result of shifts of capital during the marriage. In Denmark and Sweden the obligation to pay compensation constitutes, in addition, a form of protection against possible mismanagement by one of the spouses.

In France and Italy a claim for adjustment between the private capital and the community property may arise, if the community property has increased on account of capital stemming from such private capital. On the other hand, the community property may be adjusted, if the private capital of either spouse has benefited from the community capital, for example as a result of community property funds having been used for an improvement or for purchasing a private asset or for redeeming a private debt.

In Denmark and Sweden an adjustment of the deferred community may also be made, if monies earmarked to fall in the community were used for increasing the value of the private capital of either spouse, but in Sweden this will be subject to the condition that the transaction took place without the other spouse’s consent within a three-year period prior to the date on which divorce proceedings were instituted and that this markedly reduced the deferred matrimonial community. Moreover, in Denmark a claim for an adjustment may be made on termination of the marriage, if a spouse has prejudiced the other by wrongfully using the right to dispose of an asset.

\(^2\) Under certain circumstances claims may arise in Italy also at an earlier date.
Claims for compensatory adjustment of the private capital of the spouses. Claims for adjustment of the private property of the spouses are not regulated by matrimonial property law but by the general rules of the law of property, rights and interests. This also applies to possible claims arising in Germany for an adjustment of the capital of either spouse.

England. Where in the other considered legal systems claims for a compensatory adjustment arise, specific trust relations arise under English law for the spouses under the rules of Equity. If the wife has acquired an asset that is held in the name of her spouse or in that of the spouses jointly, she will acquire a beneficial interest in such asset. When, however, the husband did so there is, in principle, a presumption of a gift so that the wife not only acquires legal title but also a beneficial interest in the asset. If either spouse makes a considerable contribution to the improvement of an asset in which the other has a beneficial interest, the first mentioned spouse will acquire an interest or, as the case may be, a larger interest in such asset. The beneficial interest of the spouse is established by a declaration of the court.

Manner in which claims for adjustment must or can be satisfied. The manner in which claims for adjustment must or can be satisfied differs in each of the examined systems. Most systems provide that one must distinguish between an adjustment of the community and an adjustment to the community. In France an adjustment account is made pursuant to which an adjustment may be made of claims of the private capital against the community and of claims of the community against the other spouse’s private capital. If there is a remaining balance in favour of the community, the spouse must pay such amount to the community. If the balance is in favour of the private capital of either spouse, the other spouse has the choice between a payment in money or the transfer of determinate joint assets. In Italy the claim of the private capital against the community must, in the first instance, be compensated by payment of money and, if this is not possible, by movables and, in the last instance, by immovable property. In Denmark and Sweden the compensation to the prejudiced spouse consists of an increase in his or her share in the deferred community. In England a spouse who made a contribution will acquire an interest or, as the case may be, a larger interest in the asset concerned.
**Determination of the value of adjustment claims.** A rather extensive and complicated regulation of the valuation of claims for adjustment, is laid down in the French *Code civil* which is not found in the other systems. For example, in Italy there is no specific regulation; the doctrine in respect of this matter is somewhat unclear. However, it seems possible to state that claims in Italy are valued at the time the asset is taken out of the community or, as the case may be, out of the private capital. In Denmark and Sweden the value of the prejudice caused constitutes the basis. In England the court will determine the value of the *beneficial interest* when such *interest* of either spouse in the capital of the other is determined. In most cases, but not always, the value of such *interest* will correspond to the value of the contribution.

**Assets acquired with means stemming from the own capital of the spouses.** In Germany and England the question whether assets belong to the community of property when these were purchased with means stemming from the own capital of the spouses will not arise as there is no matrimonial community either during the marriage or at its dissolution. Denmark and Sweden do not have special provisions governing these issues: if an asset which was substituted for a private asset is financed partly with monies of the community, such asset will be private but there will be an adjustment of the deferred community after dissolution. In France, on the other hand, there is a specific regulation: an asset substituted for a private asset forms part of the matrimonial community, if the contribution from the community exceeds that paid out of the private capital.

**2.2. The regulation of the management of the capital when there is joint capital.**

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**2.3. Does a spouse need consent, approval or co-operation of his or her spouse when performing a determinate legal act?**

**Outline.** At the outset it may be stated that in all studied legal systems the equality and independence of the spouses prevail in the regulation of the management and administration. Of course, this is the case as regards the disposal of one’s own private assets (both in systems in which there are only private assets and in systems in which, aside from the own private capital, there is also a matrimonial community of property). However, also at the regulation of
the management and administration of assets belonging to the matrimonial community the
independence and equality of the spouses will prevail.

However, the independence of both spouses must give way in most of the examined legal systems of matrimonial property law to the protection of the ‘living situation’ (i.e. both the marital home and the household effects) of the spouses. In most systems a consent requirement replaces, in the case of the living situation, the independent right of each spouse to dispose of his or her property while in systems where this is not so, the living situation is protected in another manner.

In addition, virtually all systems provide for a general restriction in the management and administration for the protection of the (deferred) matrimonial property, if any and insofar as there is such property, or to ensure settlement of any accrual at the end of the marriage.

However, so as to avoid that the regulation of the management and administration will form an obstacle when either spouse needs to do or perform an act, the systems provide for different solutions when either spouse refuses consent or is unable to manage and administer his or her capital.

Management and administration of the private capital of the spouses. In all studied systems, both in systems without any community of property (Germany and England) and in those with a limited (deferred) community (France, Italy, Denmark and Sweden), each spouse, in principle, may independently manage and administer the assets which form part of the spouse’s own private capital.

Management and administration of joint capital. Only in France and Italy there are regulations for the management and administration of the assets which form part of an existing community of property during the marriage. In France, the joint assets fall, in principle, under a cumulative pari passu management of the spouses. In Italy a distinction is made between acts of ordinary management which may be performed by each of the spouses independently and acts of extra-ordinary management for which each requires consent from the other. In both countries the regulation of the management and administration of the matrimonial community of property is of compulsory law: no derogation may be made by the spouses in their marriage contract. As regards assets which form part of the matrimonial community of property, each spouse is independently authorised both in France and in Italy where day-to-day acts are concerned (In Italy, these acts fall under ordinary management).
For the protection of third persons contracts regarding assets, which are joint property, entered into by either spouse may be raised against the other spouse.

Management and assets used in the conduct of a profession or business. Only in Denmark and France assets used in the conduct of a profession and business of either spouse (or, in Denmark, of both spouses) take a special position where the regulation of management is concerned. In France only the spouse who conducts the profession or business may dispose of such assets, while the other spouse has no such right. As this applies to legal acts for the conduct of the own profession or business, the regulation will not apply when the spouses conduct the same profession. This regulation ensures the right of either spouse to freely conduct a profession or business. Under the Danish regulation, on the other hand, assets used for the conduct of a profession or business of a spouse or of both spouses are protected against the other spouse's right to dispose of the same. This protection of the assets is in the form of a consent requirement. If the profession or business of either spouse is connected with a joint immovable or movable thing, a spouse may not dispose of it without the other spouse’s consent.

Protection of the living situation: in general. In all examined systems the living situation of the spouses is protected. In virtually all systems, with the exception of England, such protection is achieved by a consent requirement. This consent requirement specifically extends to the living situation (Denmark, Germany (for disposing of household effects), France and Sweden) or falls under a more general restriction of the spouse’s individual powers to dispose of assets (Germany and Italy).

Protection of the living situation: object of protection. In Denmark, France and Sweden both the matrimonial home and the household effects are protected by a specific consent requirement. In Germany only the household effects are protected by such a specific consent requirement (It is to be noted: the matrimonial home falls under such a general consent

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3 However, determinate acts with regard to important capital assets which may be connected with the profession or business of either spouse (fonds the commerce, exploitation) fall under their joint management and administration.

4 I.e. an asset is earmarked to fall into the matrimonial community of property after dissolution of the marriage.

5 There are however two exceptions to such consent requirement in France: In the first case, it is not applicable to the appointment of heirs and, secondly, it is not applicable to any alienation where the right of usufruct was reserved.
requirement). In Denmark the matrimonial home and the assets which constitute household effects are protected only when these are earmarked to form part of the deferred matrimonial community of property. In contrast, in France and in Sweden the matrimonial home and the household effects are also protected when these constitute part of the private capital of either spouse.

With the exception of the Swedish system, which has a detailed statutory provision in respect of assets which, in particular, fall under the term ‘matrimonial home’, the interpretation of this term in the other systems is left to the courts.

**Protection of living situation: acts requiring consent.** A spouse not only needs the consent of the other spouse for a sale, gift or pledge of the matrimonial home but also for assigning the right to use the matrimonial home (e.g. a spouse is not authorised to independently terminate a lease). In Denmark and Sweden there is a specific provision regulating acts for which consent is required. In France not only the matrimonial home is expressly protected by law but all ‘droits par lesquels est assuré le logement de famille’. This means that all rights connected with the existence of a matrimonial home, and therefore also the rights to use the same, are protected by such consent requirements.

**Protection of the living situation: form of consent.** In Germany, France and Sweden there is no prescribed form in which consent for disposal of household effects must be given. Different from in Germany and France, where there is no prescribed form for such consent, in Sweden consent to dispose of the matrimonial home must be given in writing. In France and in Germany the non-acting spouse may ratify the contract, if it is a multilateral legal act, retrospectively. If a spouse has acted in breach of a consent requirement, the other party in Germany may force such a non-acting spouse to give an answer within a two week period (ratification or refusal to ratify). If the non-acting spouse does not react within such period, this will be regarded as a refusal.

**Protection of living situation: regulatory or mandatory law.** In France and in Sweden the statutory provisions in respect of consent requirements are of mandatory law. In France this is laid down in the régime primaire which is of mandatory application with regard to all married

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6 The BGB only mentions disposal of household effects which belong to the capital of the acting spouse. The operation of this requirement has however been extended to both the household effects which are jointly owned by the spouses and to household effects which are the property of the non-acting spouse.
couples irrespective of the elected matrimonial property regime. Under Swedish law the spouses only have the possibility to alter the composition of their respective capital within the statutory matrimonial property regime. The consent requirements remain applicable also where the spouses provided that the matrimonial home and the household effects will remain outside the deferred matrimonial community of property.

In Denmark, on the other hand, the consent requirements only apply if the assets involved are earmarked to fall in the deferred matrimonial community of property. Where the spouses provided by their marriage contract that these assets will remain outside the matrimonial community of property, no consent requirements apply.

In Germany the consent requirements only apply to the statutory system (Zugewinngemeinschaft): spouses who elect a different system are not subject to these rules (however, when they elect a general community of property, they will be subject to comparable rules). Aside therefrom, they also have the possibility to exclude these provisions by marriage contract even when married in Zugewinngemeinschaft or to tie the operation of the provisions to a determinate time limit.

**Protection of living situation: sanctions.** In all studied systems the rule is that when the acting spouse has acted in breach of the consent requirement the protected spouse may lodge an application for nullification with the court. In most cases the lodging of such an application is tied to a certain term. For instance, the non-acting spouse must lodge his or her application in France and in Italy, if the object of the legal act is immovable property or a movable registered asset, in the year following the year in which the spouse became aware of the legal act and no later than in the year following the dissolution of the matrimonial community. In Italy the one-year term also commences on registration of the legal act in the public registers. In Denmark, in the case of the disposal of the matrimonial home without consent, the claim must be instituted within three months from the spouse having become aware of the legal act and no later than within one year from registration in the register. In Sweden there is also a three month term commencing when the spouse became aware of the legal act. However, in Sweden the request may not be lodged if the instrument for the transfer of the immovable property or the right in rem therein was registered in the register. If household effects are concerned, the non-acting spouse in Denmark is bound to a three month term after having become aware of the legal act; in Sweden the same term applies but it will only commence after the spouse has become aware of the transfer of the immovable asset. In Denmark a
special term will still apply, if the movable asset which forms part of the household effects was pledged.

**Protection living situation and protection of third persons.** It is not clear how in all systems the third persons who have been mentioned here are protected. For instance, in France, third persons are not protected, in principle, in the case of a disposal of the matrimonial home without consent. However, it is unclear whether or not third persons are protected when household effects are disposed of without consent. Nullification of a legal act in respect of the matrimonial home is only possible in Denmark if the protected spouse is able to prove that the third person was or ought to have been aware that the other spouse was not so authorised. In cases where household effects are disposed of without consent, the courts in Denmark and Sweden may nullify the legal act, if the third person proves to have been in good faith. When a spouse in Germany, on the other hand, without consent of the other disposes of assets which form part of the household effects, third persons are not protected.

**Protection of matrimonial home: Germany and Italy.** It can be stated that the matrimonial home is also protected in Germany and Italy even though there are no specific statutory provisions in respect of protection of the matrimonial home. For, under their laws there is a general restriction in each spouse’s autonomy to severally manage and administer the matrimonial home. In Germany a spouse is not authorised to dispose of the own capital in its entirety and in Italy acts resulting in any substantial change in the composition or amount of the marital capital constitute 'extraordinary' management, i.e. joint management and administration. In other words, a spouse must obtain the other’s consent for such an act. As the matrimonial home usually is the most valuable marital capital asset, this will result in such consent requirements applying in virtually all cases, if either spouse wishes to dispose of the matrimonial home.

**Protection of assets used in the household.** Aside from England Italy appears to be the only country where assets used in the household are not protected.

**Protection of living situation: England.** In England, different from continental systems, the living situation is protected in a completely different way. In England a spouse non-legal...
owner of the matrimonial home is protected. In principle, the latter acquires a *matrimonial home right* to the matrimonial home which the other spouse must respect. Thus the spouse with a *matrimonial home right* may not be evicted from the home without court consent. Such *matrimonial home right* may be raised against third persons. Aside therefrom a possible *equitable interest* of either spouse in the home of which the other is *legal owner* is also protected, at least as long as the protected spouse also actually lives there. In those cases the spouse has, in principle, an *overriding interest* which may be raised against third persons.

**General regulation for the protection of the non-acting party.** Aside from the specific regulation for the protection of the matrimonial home and of the household effects, some countries also have more general regulations for the protection of the non-acting party. This is especially the case in systems where there is a 'final settlement' at the end of the marriage while the spouses are free, in principle, to dispose of their own capital during the marriage. We here refer to systems where a community of property will arise at the end of the marriage (Denmark and Sweden) and to systems which provide for a final netting (Germany). But also systems with community of property during the marriage have specific rules for protection of the non-acting spouse against acts of his or her spouse which may entail a large financial risk and could thus give rise to the community of property being substantially reduced. In general, one may state that, with the exception of England, all examined legal systems provide for rules of protection, at least in their legal system, which serve to protect the size of the (deferred) matrimonial community of property or the possibility to share in an accrual of the other spouse’s capital.

In Denmark and Sweden the deferred community of property, which will only take effect at the dissolution of the marriage, already has a certain impact on the power of the spouses to manage and administer their capital during their marriage: the spouses are not completely free to dispose of their share in the deferred matrimonial community of property. Each spouse must take into account the other's interest in such deferred community of property. If either spouse considerably reduces his or her share in the deferred community of property without the consent of the other (in Sweden it is explicitly provided that such disposition must be in the form of a gift and must take place within a three year term prior to the commencement of divorce proceedings), without taking into consideration the interest of such other spouse, the latter will have a right to compensation after dissolution of the marriage. In Denmark mismanagement by one of the spouses may also constitute a reason to apply, during the marriage, for a dissolution of the matrimonial community of property.
In Germany a spouse has no right to dispose of his or her entire capital without the other’s consent. The principal rule in the case of large estates is that there is a disposal of the entire own capital, if no more than 10% of the own capital is left. In the case of smaller estates the level is set at 15%. There is a comparable restriction in respect of the management and administration in Italy: a spouse may not without consent of the other perform acts which may result in substantial changes in the composition or size of the marital capital. Moreover, in Italy the rule is that consent of the other spouse is required for entry into contracts whereby personal rights of enjoyment are vested or acquired. In Sweden each spouse wishing to dispose of immovable property earmarked to fall in the matrimonial community must obtain the other spouse's consent.

In French law there is also a regulation to protect the matrimonial community of property against the individual acts of a spouse: there a spouse needs consent from his or her spouse for a gratuitous disposal of joint assets. Aside from the matrimonial home and the household effects also other important assets are protected against acts performed for a valuable consideration: a spouse who wishes to dispose of a *fonds de commerce*, an *exploitation* or non-negotiable partnership rights must obtain consent. A spouse may also not independently grant an agricultural lease or premises used for commercial, industrial or handicraft purposes. As regards determinate risky transactions, like entry into surety or loans, French law also has provisions which give protection: recourse for such obligations against the matrimonial community of property will be possible only in the case where the other spouse had given consent.

**General rules for the protection of the non-acting spouse: sanctions.** The sanctions for acts in breach of such consent requirements vary greatly. In Sweden and Denmark the other spouse has a right to compensation, in France and Germany the transaction may be nullified while in Italy the answer differs according to whether the spouse disposed of an immovable or a movable asset without consent.

In Italy and France each spouse is protected against bad and disorderly management and administration by the other spouse. In Italy in such cases the non-acting spouse can lodge a

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8 Small donations, informal gifts and gifts of income from labour do not fall under this regulation.
9 If in Denmark the size of the remaining community of property at the dissolution of the marriage will not be sufficient to compensate the prejudiced spouse, the claimant may have recourse for one-half of the balance against the net private capital of the other spouse. If, at the time of the division, it is not possible to satisfy such
request with the court for a dissolution of the matrimonial community. In France each spouse is liable for failure to properly manage and administer assets. An act of management and administration of either spouse based on deception may not be raised against the other in France (however, third persons in good faith are protected).

**Refusal or impossibility to grant consent.** If a spouse whose consent is needed refuses this without a well-founded reason or is unable as a result of illness or absence to give consent, his or her consent may be replaced by that of the court in all studied continental systems (Denmark, Germany, France, Italy and Sweden). The power of the court in this respect differs per system. In Germany, if it involves the disposition of the entire capital, the court must specifically consider whether the transaction for which consent is asked will constitute reasonable administration of the capital and is of a compulsory nature. Aside therefrom, German courts will always refuse consent, if the transaction would jeopardise a possible Zugewinnausgleich. In Italy the court must examine the reason for refusal. The French courts must examine whether the transaction is in the interest of the family.

Regulations may also be necessary in other situations where either spouse is unable to exercise the right of management and administration. For that reason the other spouse, in most countries, will in such a case also have the possibility to lodge a request with the court for an order to delegate the management and administration. Thus, in Denmark and Sweden in certain circumstances, mainly if the other spouse is not in a position to manage and administer his or her own capital and insufficient monies are available to provide for the needs of the family, will a spouse have the possibility to draw on the other spouse's capital. In Italy minors over whom is guardian is appointed and persons who are not in a position to manage and administer their own capital over a protracted period of time or have badly administered the same, are excluded from management and administration. The other spouse may then, at his or her request, obtain the management and administration over the share of his or her spouse. If a spouse in France who is not in a position during a protracted period to express his or her will proves unfit to manage and administer the community of property or where there is question of an wilfully misleading management and administration, the court may, at the request of the other spouse, delegate to the latter the management and administration of the joint assets, with the exclusion of the other spouse.

compensation, the prejudiced spouse may no longer claim recourse after the dissolution against capital acquired by the guilty spouse after the division.
Both in France and in Italy such a measure must be published while a spouse who is excluded from management and administration may always lodge a request for revocation of the decision, if the reason therefor has ceased to exist.

2.4. How is the liability of either spouse for the sundry liabilities during the marriage regulated? For which debts is recovery possible against which capital?

Outline. In the studied systems without community of property during the marriage (Denmark, Germany, England and Sweden) all liabilities are, in principle, private. Each spouse will only be liable for debts which he or she contracted and his or her creditor will only have recourse against his or her property. In systems with community during the marriage (France and Italy) the rules regarding liability and recourse are not so simple. Thus it is not possible to make a strict distinction between private liabilities for which only recourse against the private capital is possible and community liabilities for which recourse is only possible against community property. With the exception of Sweden and England, all systems have special regulations as regards liability and recourse for household debts.

All debts are private, in principle. In the studied systems without community of property during the marriage (Denmark, Germany, England and Sweden) all liabilities are, in principle, private (with the exception of liabilities entered into by both spouses jointly and, in certain instances, of household debts). Each spouse is only liable for the debts which he or she has contracted, while his or her creditor only has recourse against his or her own capital.

It is to be noted that in Denmark and Sweden there are special rules for the protection of third persons in the case of gifts between the spouses.

Private liabilities and community liabilities for which recourse is possible against separate capital. In France and Italy, which have systems with a limited community of property, there is no complete symmetry, different from the aforementioned systems, between the situation of active capital and the situation of passive capital. For example, for debts relating to private assets recourse in France is also possible, in principle, against the matrimonial community and, for example, in Italy in the case of debts relating to community property recourse is possible for one-half against the private capital of the spouse who contracted the debt (however, only if the matrimonial community is insufficient). For the rest and conversely, recourse for private debts is possible in Italy, in certain circumstances and
subject to certain conditions, against the matrimonial community and in France, for community debts, against the private capital of both spouses. It is therefore not possible to strictly distinguish between private debts and liabilities for which recourse is only possible against the private capital and community debts for which recourse is only possible against the community. Furthermore, it is to be noted that the community has no legal personality and may therefore not contract debts. Only a spouse may contract a debt so that each spouse, in principle, only commits the own capital and thus his or her private capital and share in the matrimonial community. This, however, does not exclude that determinate debts must ultimately be borne by the community or just out of the private capital of either spouse. The capital in favour of which debts were made must, in principle, also bear such debts. Here again one may thus again find an active and passive symmetry.

**Liability and recourse for household debts.** With the exception of Sweden and England, both spouses in all examined systems are, in principle, liable for household debts. This brings with it that in systems without community (in this case Denmark and Germany) creditors have recourse against the private capital of both spouses and in systems with a community (France and Italy) creditors have recourse against the community and the private capital of both spouses. However, in Italy the creditors must first have recourse against the community and only when this proves insufficient they may have recourse against the private capital of each spouse, each for one-half of the debt.

In Denmark the husband is, in principle, liable for debts contracted by his wife for her own needs. This is an old-fashioned regulation which is seldom applied in practice. In England there is a presumption that a wife represents her husband where debts are contracted for the household. In principle, the husband will then only be liable. However, this is only a rebuttable presumption.
3. Winding up of the matrimonial property

3.1. Is there undivided marital property after the dissolution of the marriage?

**Outline.** Only in systems with a (deferred) community (Denmark, France, Italy and Sweden) there is undivided marital property at the dissolution of a marriage. In such systems the partitioning of the undivided marital property is made in equal halves.

Otherwise than in France and Italy, both in Denmark and in Sweden the capital contributed at the beginning of the marriage falls in the community after dissolution of the marriage. In all studied systems which provide for undivided marital property after dissolution of the marriage, capital acquired during the marriage otherwise than pursuant to inheritance law or gifts forms part of such undivided capital. There are, however, a number of exceptions, in principle, in all four systems. Capital acquired during the marriage pursuant to inheritance law or gifts constitutes part of the undivided marital property in Denmark and Sweden. The contrary is the case in France and Italy.

Although, after dissolution of the marriage, there is no undivided property either according to the German or the English legal system, some observations may be made on the separate capital arising according to, respectively, the German final netting system and English 'matrimonial property law'.

Only in Germany and England there are special regulations on the apportionment of the accrued pension rights. In Denmark only a determinate type of pension forms part of the undivided marital property. In the other systems no type of pension is divided at all.

In France and Italy there may be 'non-personal' debts at the dissolution of the marriage. Only in France there are special rules in respect of debts on account thereof. Under all systems without a community during the marriage (Denmark, Germany, England and Sweden) there are, in principle, no 'non-personal' debts; each spouse remains solely liable for debts contracted by him or her and recourse for such debts is possible only against his or her own capital. However, in Denmark and Sweden debts do fall in the undivided marital property.

Creditors of the matrimonial community of property are protected in all countries with a (deferred) community as a result of the fact that a dissolution of the marriage will not affect their right of recourse. Aside therefrom, France and Sweden have a special regulation for the protection of creditors of the spouses.
In Denmark and Sweden each spouse will, in principle, remain empowered to independently dispose of his or her share in the undivided marital property. In France and Italy, on the other hand, both spouses jointly manage and administer the undivided marital property. In all studied legal systems the non-acting party is protected.

In all studied systems there are special rules for the division of the matrimonial home. Only Germany and Denmark have specific regulations for the division of assets constituting household effects. Special rules as regards the division of assets used for the conduct of a profession or business of one of the spouses only exist in Denmark and France. Of importance in the other studied systems is, however, whether these assets should be divided at all and whether these do not form part of the private capital of the spouse who conducts the profession or business.

No undivided marital property. In the studied systems without a (deferred) matrimonial community (Germany and England), there will be undivided marital property after dissolution of the marriage, which must then be divided between the spouses. Under German law there is a final netting system. English law, on the other hand, does not provide for indivisible marital property nor for a final netting system. In England each spouse will, also after dissolution of the marriage, remain the sole owner of capital contributed to the marriage and capital acquired during the marriage. However, the court is in no way bound to titles of ownership at a division of marriage-related capital and may make different property adjustments.

Undivided marital property. In systems with a (deferred) community (Denmark, France, Italy and Sweden) there will be undivided marital property after or at a dissolution of the marriage, which must then be divided between the spouses. In France the matrimonial community ceases to exist at the dissolution of the marriage. There will then be undivided marriage-related property. The undivided marital property is, so it would appear, a matrimonial community. When it is stated in France that an asset forms part of the undivided marital property, one may assume that the asset will also fall in the community during the marriage and conversely. In Denmark and Sweden, on the other hand, there is undivided marital property because only at the dissolution of the marriage will there be community of property. With the exception of a number of determinate assets, all assets and liabilities (of both spouses) fall in such community after dissolution of the marriage. In the Italian system (which provides both for a community of property during the marriage and for a deferred community) one encounters both: the assets which form part of the matrimonial community
converge with the assets which form part of the deferred community in an 'ordinary' community (the comunione ordinaria). The deferred community is called in Italy the remaining community property because only determinate assets to the extent that these were not consumed fall in such a community. Assets are not considered as having been consumed to the extent that any remain after the creditors of the spouse, who were so entitled, were discharged.

**Division in equal halves.** In all studied systems with undivided marital property at a dissolution of the marriage the division is made in equal halves.

**Extent of undivided marital property: capital contributed at the commencement of the marriage.** Both in Denmark and in Sweden capital contributed at the commencement of the marriage falls in the community after the dissolution of the marriage. On the other hand, in France and Italy such capital does not form part of the undivided marital property. For, in France it does not form part of the matrimonial community during the marriage; as a result it will also form part of the undivided marital capital after dissolution of the marriage. Also in Italy this capital remains private capital during the marriage and as it does not fall in the deferred community, it will not form part of the undivided marital property after the marriage either.

**Extent of undivided marital property: otherwise than capital built up pursuant to inheritance law or from gifts.** In all studied systems which provide for an undivided marital property after dissolution of the marriage (Denmark, France, Italy and Sweden), capital acquired during the marriage otherwise than pursuant to inheritance law or from gifts forms part of such undivided marital property, in principle.

However, in all four systems there are a number of exceptions to this principle. Certain exceptions apply in respect of all mentioned systems and some do not.

Exceptions which apply to all systems relate to assets for strictly personal use (clothing, jewelry, etc.), determinate non-assignable rights (e.g. pension rights) and other rights of a personal nature (e.g. claims for damages\(^1\)). Both during the marriage and after its dissolution these assets form part of the private capital of either spouse. It must be kept in mind that rights of a personal nature are private only in Sweden up to the time when the claim becomes

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\(^1\) France: tangible and intangible loss; Denmark and Sweden: intangible loss; Italy: loss caused to property or to a person.
exigible. Money which a spouse has obtained e.g. as intangible compensation thus forms part of the undivided marital property.

Exceptions which apply only for France and Italy relate to 1. assets used professionally by one of the spouses and 2. assets which take the place of a private asset, 3. assets connected with a private asset as a result of accession and 4. profits from lotto or other games of chance. In both systems such assets do not, in principle, form part of the undivided marital property.

**Ad 1.** In France assets used in the conduct of a profession of a spouse are private, provided they are not part of an undertaking belonging to the community of property and are subject to compensation to the community (that is, if such assets are financed, in full or in part, with monies from the community, these must be compensated). In Italy it is, in principle, not of importance with which monies the asset was purchased. Only an asset acquired with means from the (deferred) community which at a given moment is no longer used in the conduct of the profession of one of the partners falls in the community. In Italy the rule further is that a common asset remains joint property even when it is later intended for use in the conduct of a profession of either spouse.

**Ad 2.** Assets which are substituted for a private asset remain private, both in France and Italy. In both systems these are assets acquired with proceeds from or by an exchange of a personal asset. In such cases in Italy the acquiring spouse must always explicitly state that the substituted asset falls in his or her private capital (incidentally, the acquiring spouse may also decide that the assets purchased with the own means fall in the community). In France the substituted asset automatically forms part of the private capital in the case of immediate substitution of property and exchange. When also in other instances a spouse in France wishes that an asset acquired with monies stemming from his or her private capital will fall in his or her private capital, the spouse must make a ‘statement of reinvestment’ when making the purchase.

**Ad 3.** According to case law of the Italian *Corte di Cassazione* a construction built on the initiative of either or of both spouses on a site which is the private property of one of the spouses falls in the private capital of the spouse-owner of the land by accession. However, according to case-law of lower courts and part of the doctrine, it falls in the community of property as a new acquisition. The French solution corresponds to that of the Italian *Corte di Cassazione*: a construction erected on private land will also become private. In France there is no discussion on this as the rule has been laid down in the *Code civil*. It provides that an asset will also become private when it is added to or united with a private asset.
Ad 4. Profits from lotto or other games of chance fall outside the community both in France and in Italy, if the stake was private and, in Italy, when substitution of the thing is claimed, and in France, when a statement of reinvestment is made.

Exceptions which either apply only for France or only for Italy relate to businesses and capital assets relating to businesses. Assets used in the business of either spouse fall in the private capital of the spouse-owner in France. On the other hand, assets used in the joint business of the spouses fall in the community in France. In Italy business assets only form part of the private capital of the spouse-owner, if the business of the spouses was established prior to the marriage. Where the business is established during the marriage the business assets, insofar as not consumed, fall into the so-called remainder community of property. It is to be noted that an increase in value (to the extent not consumed) of a business established by a spouse prior to the marriage falls in the remainder community of property. Where a business established by either spouse prior to the marriage is managed by both spouses, any profits and increase in value already fall in the matrimonial community during the marriage.

In all systems which provide for an undivided marital property saved income from labour and collected but not yet consumed proceeds from private assets form part of the undivided marital property at the termination of the matrimonial community and thus form no exception to the principle that assets acquired during the marriage otherwise than pursuant to inheritance law or gifts form part of the undivided marital property. Nevertheless these assets take a special position both in Italy and in France. In Italy such assets\(^2\) fall in the (deferred) remainder community of property only after dissolution of the marriage. In France it was long uncertain to which capital these assets belonged. Finally, the Cour de cassation held that these assets also form part of the community. However, income from labour of a spouse takes a special position: there may be no recourse for community debts contracted by either spouse against the income from labour of the other spouse.

**Extent of undivided marital property:** capital acquired under inheritance law or from gifts. Capital acquired during the marriage pursuant to inheritance law or from gifts forms part of the undivided marital property in Denmark and Sweden. In France and Italy the contrary is the case. In all systems the testators or donors may otherwise provide by their testamentary disposition or a gift instrument.

\(^2\) The assets are not considered as having been consumed to the extent any remain after the creditors of the spouse entitled thereto were discharged.
In Denmark and Sweden the testator or donor may provide that the assets concerned will remain outside the community. However, in that case the spouses again have the possibility, provided the testator or donor gave their consent, to agree that the assets will fall in the community after all.

In France and Italy the testator or donor may provide that the assets will fall in the community. As far as is known spouses may not derogate therefrom by contract. In France a gift made or an inheritance left to both spouses falls in the community, in principle. The testator or donor may also in this case lay down the contrary.

**Position of capital with a different origin or different date of acquisition in Germany and England.** Although neither the German nor the English legal system provide for undivided marital property after dissolution of the marriage, nevertheless the following may be observed as to the treatment of capital differing in origin or date of acquisition according to the German final netting system and English ‘matrimonial property law’, respectively.

The capital contributed on entry into the marriage forms the basis of the initial capital under the German final netting system (see below). The initial capital is the capital present at the entry into the marriage after subtraction of the then existing debt (up to at most the present assets). The initial capital may never be negative unless the parties otherwise agree by marriage contract. In England it is assumed that the ownership of assets which the spouses already possess prior to their marriage will not be affected by the marriage. For that reason the courts will normally apportion such assets to the spouse with the entitlement at a division.

Capital built up during the marriage constitutes the final capital in the German final netting system after a subtraction of the debts. The final capital may not be negative. The present final capital may be increased with determinate amounts which were withdrawn from the capital as a result of gifts, dissipation or other legal acts whereby prejudice was caused to the other spouse. Joint obligations of the spouses must be taken into account at the calculation of each one’s own capital pro rata to the spouse’s share in such obligations. In England either spouse is the owner of income from labour or from capital acquired during marriage. Where the spouses put their income in hotchpot (e.g. a joint account), both acquire a joint interest therein. Assets purchased by either spouse with money stemming from the joint account are, in principle, the property of such spouse if the assets were intended for personal use. On the other hand, if they were intended for joint use, then the assets will belong to both spouses. Investments financed by either spouse with money from the joint account will, in principle,
only belong to that spouse, unless it is manifest that the investments were intended to take the place of the original capital.

In the German final netting system net capital acquired during the marriage pursuant to inheritance law or as a result of gifts are considered part of the initial capital and, for that reason, do not count as capital. To the contrary, a capital increase of assets acquired pursuant to inheritance law or as a result of gifts are considered part of the accrual. Also regular contributions (from e.g. parents) are sometimes considered to be part of the accrual. According to case-law lotto-profits and damages for pain and suffering are also included for the purpose of calculating the accrual even when, like gifts, these are acquisitions to which the other spouse did not contribute in any way. In England it will depend on the intention of the donor or testator in which spouse capital acquired during the marriage stemming from inheritance law or gifts will vest.

Pension: no separate regulations. In France, Italy and Sweden no regulations exist regarding the division of accrued pension rights and no single type of pension forms part of the undivided marital property. Also in Denmark there are no regulations for accrued pensions, but one type of pension, the so-called ‘capital pension’, forms part of the deferred community of property. Pension rights which entitle a spouse to periodical payments during his or her life are, however, not divided. In Denmark work is undertaken on legislation in this field. It is intended to enact a separate (general) regulation for a division of built-up pensions.

However, in three of the four legal systems with undivided marital property after dissolution of the marriage the widow (and widower) will have a pension under certain conditions. One can therefore state in outline that a former spouse in Denmark, France and Italy who meets a number of specific requirements will be entitled on the death of the ex-spouse to the latter’s old age pension. It is noteworthy that in Denmark only the wife may claim such a pension.

In Sweden all pension rights remain outside the community while, moreover, a widow’s pension was abolished within the framework of emancipation. A limited transitional support for the surviving spouse has taken its place which makes no distinction between husband and wife.

Pension: separate regulations. Different from systems with undivided marital property after dissolution of the marriage, there is a separate regulation in the German and English systems as regards the division of built up pensions. In Germany pension netting takes place after the
divorce. This is not (yet) the case in England. Under English law, however, (a loss of) pension provisions is taken into account in four different ways at a division of marriage-related property.

In Germany pension equalisation consists, in brief, of a comparison of the accrued pension rights of the spouses whereby the spouse whose accrued pension rights have the highest value must pay the other spouse one-half of the excess value. However, there are some important differences between pension equalisation under public law and under the law of obligations. Thus a spouse who is entitled to pension equalisation under public law will already have a direct claim against the insurance company or the body at the time of the divorce, while such a spouse would only have a claim against the other spouse when an equalisation of pensions is made under the law of obligations when the pension subject to equalisation will become payable. For the rest, equalisation of pensions takes place regardless of the matrimonial property regime under which the spouses were married unless the spouses excluded any equalisation of their pensions by marriage contract. Such a marriage contract will, however, not be enforceable if it was contracted during the marriage and less than one year prior to the divorce petition.

The introduction in England of equalisation of pensions has been postponed until April 2001 according to the latest information. There are now four different ways in which (the loss of) pension claims may or must be taken into account: 1. the courts have the duty to have regard to the pension arrangements of the parties when imposing its financial provision order, 2. the courts have the possibility to instruct the body obliged to make the pension payments to the spouse with a pension entitlement to pay a lump sum or periodical payments to the other spouse (‘pension earmarking’) (incidentally, these instructions will take effect only on or from the date on which the spouse who is entitled to the pension will retire and payment of the pension can be made, 3. the court may instruct the spouse entitled to a pension to pay (‘set off’) a determinate amount to compensate the other party, 4. in specific instances the court may alter a pension arrangement.

Reference dates for drawing up an inventory and valuation of the capital of each of the spouses. In England the problems of reference dates do not play a role as no community of property will arise either during or after the marriage. In the other systems the reference dates for drawing up an inventory and the valuation of the capital of either spouse differ.
**Drawing up of inventory.** In Germany, where no description of the spouses property is made, which is usually the case, it will be presumed that there was *no* initial capital (the initial capital is set at zero in such a case). The time at which the divorce petition is lodged will constitute the reference date for the drawing up of an inventory of the final capital. In Sweden and France the reference date for inventarisation of the (deferred) community is also, in principle, the time at which the divorce petition is lodged. However, in France either spouse or both spouses may request that the reference date is set at the time of termination of the cohabitation or collaboration.\(^3\) In Italy and Denmark, on the other hand, - in Denmark this is regarded as a weak point of the statutory system – the reference date for drawing up the inventory of the (deferred) community coincides with the dissolution of the marriage.

**Valuation.** In Germany the reference date for valuation of the initial capital is, in principle, the time of commencement of the *Zugewinngemeinschaft*. The determination of the value of the assets acquired during the marriage which must be considered as initial capital is made on the basis of the value at the time of the acquisition. Separate rules apply for agricultural and forestry enterprises.

In Denmark and Sweden the reference date for valuation is the time of division which, in principle, only commences once the marriage is dissolved. Only in Sweden each spouse may already apply for a division during the divorce proceedings. In France and Italy the valuation also takes place, in principle, at the time of the division.

**Liability for non-personal debts after dissolution of the marriage.** In systems with a community during the marriage (France and Italy) ‘non-personal’ debts may exist after dissolution of the marriage. Only in France special rules apply with regard to liability for such debts. Each ex-spouse in France, after dissolution of the marriage, is liable both for community debts contracted by him or her and for one-half of community debts contracted by the other spouse. In Italy, after the dissolution and prior to the division of the community, the general rules of the law of property, rights and interests apply to the (standard) community regime.

**Protection of spouse/non-debtor after dissolution.** The liability rules for community debts after dissolution of the marriage in France have given rise to a rule protecting the private

\(^3\) This reference date will then only apply between the spouses. As regards third persons the matrimonial community of property continues to exist until the divorce decree is registered.
capital of the spouse/non-debtor after the division of the estate. The French protection rule in question provides that an ex-spouse/non-debtor will, after the division, be liable only up to the amount corresponding with his or her share in the community (*bénéfice d’émolument*).

**Systems without ‘non-personal’ debts.** In principle, there are no ‘non-personal’ debts in all the systems without a community regime during the marriage (Denmark, Germany, England and Sweden) at a dissolution of the marriage: each spouse only remains liable for debts contracted by him or her while recourse in respect of such debts may be made only against his or her own capital. However, in Denmark and Sweden account is taken of these debts because, in addition to the assets, they also fall in the deferred community regime. The remaining net capital is divided between the spouses.

In these systems the liability for any debts which the spouses contracted jointly will governed by the general rules of the law of contract or the law of property, rights and interests. Denmark, however, has specific provisions as regards the obligation to contribute to debts contracted by the spouses jointly: at the division each spouse may require the other to pay his or her part of the debt or to furnish security therefor.

**Protection of creditors of the matrimonial community of property after dissolution.** In all systems with a (deferred) community creditors of the matrimonial community of property are protected by the fact that a dissolution of the marriage will not affect their rights of recourse. In addition, France and Sweden have special rules for the protection of creditors of the community of property. For instance, in Sweden a spouse may not procure with the aim of defrauding his or her creditors that any private capital will fall in the matrimonial community of property at the division nor may he or she renounce capital which should fall in the matrimonial community of property. A spouse may also not renounce capital which may be seized in exchange for capital for which no such seizure is possible. If an ex-spouse has acted contrary to this provision and will be unable to settle a debt, the creditor may claim the shortfall from the other former spouse. If spouses in France reach an agreement which derogates from the statutory provisions as regards the liability for community debts, such agreement may only be raised against third persons when the spouses interests are not adversely affected. Moreover, a former spouse in France may not claim his or her *bénéfice d’émolument* if the spouse's withdrawal of assets from the matrimonial community of property was made solely for causing detriment to the creditors of the community of property.
Managing and administering the undivided ‘masse’, marital property, after dissolution: **in general.** In Germany and England there is no undivided ‘masse’ on dissolution of the marriage, while in Denmark, France, Italy and Sweden there will be such an undivided ‘masse’. However, in Denmark and Sweden each spouse will remain empowered to independently dispose of the assets contributed to the community of property. In France and Italy, on the other hand, both spouses must jointly manage and administer the undivided marriage-related assets. In all countries the non-acting party will be protected.

**Right to independently manage and administer the spouse’s share.** When the marriage is dissolved there will be a community of property in Denmark and Sweden. During the period preceding the division each spouse remains empowered to dispose of his or her share in the community of property. In Denmark the spouse must, however, account to the court which will direct the division for any acts of disposal of assets.

**Joint management and administration.** On the other hand, in France and Italy the former spouses must, in principle, jointly manage and administer the undivided marital property.

There is an exception to the principle of joint management and administration in both countries: in France either spouse may independently perform acts for the preservation or maintenance of an asset, while in Italy a spouse may perform legal acts independently in certain conditions when this will serve to improve the use of an asset. In order to avoid that a joint management and administration will lead to an impossible situation, the consent of a spouse may be replaced in France and Italy, in certain circumstances, by that of the court or the court may authorise a former spouse to represent the other. Aside therefrom, the former spouses in both systems may also enter into a representation contract, while in France there will in certain cases be a presumption that a former spouse is represented by the other spouse.

**Protection of a non-acting party.** In all examined systems a former spouse is protected after dissolution of the marriage against acts of the other spouse which will adversely affect him or her. This is achieved either by vesting certain powers in the court or by provisions governing the management and administration. In Denmark, Germany, England and Sweden the first mentioned possibility was chosen while the second one was chosen in France and Italy. For instance, in Germany the court may order seizure of part of the capital of the former spouse and in England and Denmark the court may deprive a spouse of the right to dispose of part of the entire capital. In Sweden the court may appoint an ad hoc administrator to manage and
administer the capital of either former spouses. In France and Italy the spouses are protected vis-à-vis each other by the rules for joint management and administration.

**Special rules for the division as regards the matrimonial home.** In most cases the matrimonial home is, both financially and emotionally, the principal capital asset of the spouses. Its allocation will often be the principal issue in the divorce proceedings so that special provisions apply in respect thereof in all examined systems. With the exception of England and Italy, a distinction is then made as to whether the matrimonial home is rented or the property of both spouses or either one. The instances in which a spouse is allotted the matrimonial home differ per system. However, in all cases and in all systems particular importance is attached to the welfare of the children of the former spouses.

**Matrimonial home: property of one spouse.** In systems without a matrimonial community of property (Germany and England) usually only one of the spouses owns the matrimonial home. However, also in systems with a matrimonial community of property during the marriage (France and Italy) or at its dissolution (Denmark and Sweden) the matrimonial home sometimes forms part of the private capital of one of the spouses. In all studied systems the court has, under specific conditions, a possibility to allot the matrimonial home to the spouse/non-owner. In Denmark this possibility only exists if the matrimonial home is part of a building consisting of several dwellings owned by one of the spouses.

Except in England, a court in none of the systems dealt with here has the power to transfer ownership of the matrimonial home. It may only confer a right of use to a former spouse/non-owner. Moreover, in most systems this right is limited in time.

In Denmark the grant of the right to a spouse/non-owner of using the matrimonial home is not tied to special conditions. In Germany, on the other hand, this possibility only exists where this may avoid unfairness. In France this will also only be possible under certain conditions. For instance, a French court may give the right of use of the home in the first place to the former spouse/non-owner who cares for one or more children with their habitual abode in the home involved. Aside therefrom courts in France may grant a spouse who filed the divorce petition because they no longer live together as husband and wife (divorce pour rupture de la vie commune) a right of enjoyment of, and the right to live in, the previous matrimonial home which is the property of the other spouse.
Matrimonial home: joint property of both spouses. In systems with a matrimonial community of property during the marriage or on the dissolution thereof the matrimonial home usually forms part of the matrimonial community of property. However, also in systems without a matrimonial community of property, the matrimonial home is sometimes registered in the name of both spouses. In all examined systems the courts have the power to grant the entire home to either spouse. The criteria which courts must then take into account differ, however, per system. In Denmark a spouse will be given the right to the use of the matrimonial home where this is essential for preserving the family home. In Germany the courts must seek a reasonable solution taking into account all circumstances of the case and, in particular, the welfare of the children and the ‘Erfordernisse des Gemeinschaftslebens’. In both France and Sweden the courts must balance the interests of both spouses. In France, moreover, it is a condition that the spouse to whom the home is allotted will use it in fact.

With the exception of Germany and Italy, a spouse will be conferred in this case and in all studied systems the ownership of the entire home. On the other hand, in Germany and Italy the spouse will, in principle, only have the right of residing in the entire home. To the extent this is practically possible, the courts in Germany may also order that the matrimonial home be separated into two separate living areas.

In Sweden and Denmark a spouse who looses his or her share will, in principle, be compensated by a larger share in the matrimonial community of property. In France récompense is due to a spouse for the matrimonial community of property or the transfer may discharge the obligation of making a payment of a prestation compensatoire. In Germany the compensation will, in principle, take the form of a periodical payment. When a balance remains due to the other party in France, Denmark and Sweden, the payment must be made immediately, in principle. If immediate payment appears unreasonable, courts in Denmark may order payment in instalments. In France and Sweden the courts may order postponement of such payment.

Rented accommodation. In France both spouses are deemed lessees of the matrimonial home during their marriage. After their divorce the courts have the power to grant the tenancy to either spouse. They must then take into account the actual social and family interests. In Germany the courts may also make provisions with regard to the tenancy rights. Different from in France, third persons in Germany who have an interest in the dwelling must be heard. Consent of the lessor needs only to be obtained on the other hand, if the request is made more than one year after the divorce was pronounced. In both systems there are further rules for the
protection of the lessor. Moreover, in both systems the other spouse will in such case also have a right to compensation. In Sweden and in Denmark the courts may order in whom the tenancy right to the matrimonial home will vest. The lessor must respect such a decision.

**Tied accommodation.** There are special rules in Germany where the matrimonial home constitutes tied accommodation. In that case consent of the employer must be obtained when the accommodation is acquired by the non-employed party.

**England and Italy.** In England the courts have wide discretionary powers to adjust the property rights position of the spouses and may devise numerous constructions around the matrimonial home without being restricted by the title of ownership or tenancy rights. In Italy (regardless whether the matrimonial home is rented or the property of either spouse or of both spouses) a spouse in a weaker economic position and who is given parental authority over the minors or actually has the care of such children will in all cases have a preferential right to the matrimonial home. Based on case-law the exercising of parental authority (or having the actual care) constitutes an essential condition for being granted the right to the matrimonial home. Where the matrimonial home is rented and the spouse/non-lessee is granted a right to the home by the court, the latter spouse will automatically take the position of lessee in the lease.

**Criteria for being granted the matrimonial home, the interest of the welfare of the children.** The criteria for being granted the home differ per legal system and, in most legal systems, also from case to case (matrimonial home is rented or the property of either spouse or of both spouses). However, on the basis of the foregoing it may be stated in general that in all systems the courts must seek a reasonable solution, taking into account the interests of the spouses and the welfare of the children, which in all studied systems results in the principal rule that a spouse with parental authority or who at least lives with the children will be granted the right to live in the matrimonial home. Such a right may, however, be limited as to time and e.g. cease when the youngest child has become of age or will be able to provide in its own keep.

**Special rules for the division as regards the household effects.** Only Germany and Denmark have specific rules for the division of assets which constitute household effects. In Denmark a spouse who needs the assets for maintaining the family home or who uses these in
particular may request that they be apportioned to him or her. In Germany a presumption of common title applies to assets which constitute household effects as a result of which these will be divided in equal halves, in principle. In Germany the courts may, in certain circumstances, grant a spouse/non-owner household effects which were proved to belong to the private capital of one of the spouses.

**Same rules as for allocation of the matrimonial home.** In Sweden and Italy there are also rules as regards the division of assets constituting household effects. These rules are, however, the same as the rules which apply to the allocation of the matrimonial home. In principle, in Sweden such assets are granted to the most needy spouse while in Italy the spouse with parental authority (or in certain circumstances the spouse with whom the children of age live) will be granted the same.

**No particular rules.** In France the household effects form part, in principle, of the matrimonial community of property and are divided by halves between the spouses. In practice, the English courts appear to apply the same division by halves.

**Legal relationship in respect of household effects.** With the exception of Germany, a spouse to whom the assets are granted will in all systems become owner thereof. In Germany, however, the courts have the possibility to create a lease.

**Compensation for other spouse.** In situations where the other spouse suffers a loss by the granting of assets constituting household effects, he or she will have a right to compensation in all systems, except the Italian system. In systems with a matrimonial community of property, this is in the form of a reduction of the share in the matrimonial community of property of the spouse who benefited. If the courts in Germany create a lease, the compensation is in the form of a periodical payment. In the case of a transfer of title, the spouse/owner is compensated by a sum of money.

**Special rules as regards the division of assets used for the conduct of a profession or business.** Only Denmark and France have special rules as regards assets used for the conduct of a profession or business of either spouse. In principle, such assets will be allotted to the spouse who actually uses the same.
In Denmark a spouse may request that a business be allotted to him if he or she, exclusively or principally, manages such business alone. The assets used in the conduct of a profession or business of either spouse may be granted in Denmark to the spouse/non-owner, if this may be regarded as reasonable for a continuation of his or her profession or business. In France the spouse who manages a joint business will, in certain circumstances, be granted the right to request that such assets be granted to him by preference. However, courts are not compelled to honour such request for allotment. Immovable property used in the conduct of the profession of either spouse or the right to lease such property and the movables present in such property will also fall in the category of assets to which one of the spouses will possess a preferential right for allotment.

**Assets used for a profession or business: divided or not-divided.** In the other systems it will be of interest whether assets used in the conduct of a profession or business are divided at all or constitute part of the private capital of the spouse who conducts such a profession or business.

In systems without community of property such assets belong, in principle, to the private capital of the spouses and should therefore not be divided. The same applies in France and Italy (systems with a matrimonial community of property) to assets used in the conduct of a profession of either spouse. Assets used in the conduct of a business of either spouse also belong to the private capital of the spouse/owner. On the other hand, assets used in France for the joint business of the spouses fall in the community of property. In Italy it will depend on several factors (related to the business established prior to or during the marriage, established by one spouse or by both spouses, managed by one spouse or by both spouses jointly) whether the business assets fall in the private capital of either spouse, the matrimonial community of property or the deferred remaining community of property.

3.2. Does the matrimonial property law provide for a statutory equalisation system?

**Outline.** With the exception of the German legal system, none of the studied legal systems provide for a statutory equalisation. The German statutory matrimonial property system, the *Zugewinngemeinschaft*, provides for a final equalisation system.

**No statutory equalisation system.** There is no statutory equalisation system in Denmark, England, France, Italy and Sweden.
**Final equalisation system.** The German statutory matrimonial property system, the Zugewinngemeinschaft, provides for a final equalisation system. On the termination of the Zugewinngemeinschaft as a result of the dissolution of the marriage or of the entry into a marriage contract, the Zugewinn (accrual) must be divided between the spouses. If the Zugewinngemeinschaft is terminated for a reason other than the death of either spouse (e.g. by divorce), the division is effectuated by the spouse who is entitled to equalisation (being the one whose accrual is smallest) who will, in principle, obtain a pecuniary claim to equalisation based on the accrual.

The accrual (Zugewinn) is calculated by comparing the initial capital with the final capital. The spouse with the highest accrual must compensate one-half of the difference of the accrual to the other. Hereinbefore we already dealt with the question what effect the respective position of the different capital of the spouses, which has arisen on account of the origin or date of acquisition, will have when the calculation is made. Hereinafter these positions will again be briefly stated.

The capital contributed on entry into the marriage constitutes the basis of the initial capital. The final capital will consist of the capital built-up during the marriage after subtraction of the debts. The net capital acquired during the marriage pursuant to an inheritance or from gifts is considered initial capital and will, in principle, not be included in the accrual. On the other hand, any increase in value of net capital will be considered an accrual.

**Final equalisation system: right to claim assets instead of money.** The equalisation claim is, in principle, a pecuniary claim. If a pecuniary payment would be highly unfair and it would be reasonable if the spouse who must effectuate an equalisation were to be required to make the payment in kind, the court may order the debtor, at the request of the spouse entitled to the equalisation payment, to transfer specific capital assets in lieu of money.

**Final equalisation system: strengthening the position of the party in a weaker economic position.** By mutually comparing the accrued capital of the spouses in the final equalisation system in Germany it is ensured that the spouse in a weaker economic position will share in the increase of the capital of the other.
Strengthening of the position of the party who is economically weaker in the other statutory matrimonial property regimes. In the statutory matrimonial property regimes of the other studied legal systems the position of the economically weaker party is strengthened or protected. In Denmark, France, Italy and Sweden the position of the party who enjoyed less income during the marriage is strengthened when the marriage-related property is wound up, because such a party, based on the fact that each of the spouses will have a right to one-half of the existing undivided marital property after dissolution of the marriage, will share in the assets of the party in a stronger economic position. The ‘party in a stronger economic position’ here means the person who, at the end of the marriage, has the greatest capital after subtraction of the debts. In England the courts have wide discretionary powers at the winding up of the 'marital capital' which will permit it to order measures, (which are applied by the courts in practice), for protecting the party in a weaker economic position or, as the case may be, which will strengthen the latter's position. In specific instances also the courts in Denmark, France and Sweden have such discretionary powers, although these are significantly less wide than in England. For, if in Denmark the spouses in their marriage contract have excluded capital from their matrimonial property regime, the courts have the power, at the request of either spouse, to grant compensation to the party in a weaker economic position so that no unreasonable economic situation will arise. In France, when either spouse so requests, the courts may also grant a prestation compensatoire at a division of the estate so as to redress a certain balance between the position of the spouses as regards their property rights. In Sweden, if the marriage contract is unreasonable, the courts have the power to alter or disregard the contract at a division of the marriage-related property. The courts may, however, only make a very restrictive use of this right. The courts also have the power to order that a lump sum maintenance payment be made to the party in a weaker economic position.

3.3. Are there special provisions for assets used in the conduct of a profession or business?

See at questions 2.2, 2.3 and 3.1.

3.4. Is there a relation between the liquidation of the marital capital and the granting of maintenance?
Outline. In all studied legal systems there are provisions regulating maintenance for former spouses. Both in Denmark and in France there are separate regulations for compensation, aside from a (limited) regulation in respect of maintenance.

It is difficult to indicate with any precision to which extent the division of the estate will be affected by provisions for maintenance in a divorce covenant, in Denmark, Germany and Italy. However, it is probable that these will be of actual importance. When spouses in France and Denmark decide to grant compensation, they will, by definition, derogate from a division of the marriage-related property as would follow from the matrimonial property regime under which they were married.

In all studied legal systems the liquidation of the marital capital will indirectly affect the granting of maintenance.

English law takes a special position compared with continental legal systems, because English divorce law and its matrimonial property law can hardly be considered to be distinct.

Maintenance and compensation. There are regulations for the maintenance of former spouses in all studied legal systems. Both in Denmark and in France there is a separate regulation for compensation aside from a (limited) regulation in respect of maintenance.

In France it was the intention of the legislator that compensation would replace maintenance. Maintenance (pension alimentaire) strictu senso may only still be granted in two specific instances: 1. in the case of a divorce petition based on the spouses having lived apart for more than 6 years, the courts may grant maintenance to either spouse, 2. in the case of a divorce on the joint petition, the spouses may, in their divorce covenant, elect that a pension alimentaire be granted to either one of them. In the other instances the courts may grant either spouse, at his or her request, compensation (prestation compensatoire) in order to balance the property rights position of the former spouses.

In Denmark, at the request of either spouse, the courts may order a spouse to pay a fixed amount to the former spouse in order that no (economic) unreasonable situation will arise due to the spouse's exclusion of capital from the deferred community in their marriage contract.

Although the Danish and French compensation regulation correspond in some respects, one must ultimately conclude that the differences tilt the scales: the main difference is that the courts in Denmark may grant compensation only if the spouses excluded capital from the deferred community in their marriage contract, while in France it will not make any difference under which regime or under which marriage contract the spouses were married. Another important difference is that while in Denmark the compensation will consist of a lump sum
payment of a fixed amount, the compensation in France often takes the form of a periodical payment (although this was explicitly not the intention of the legislator). As a result, the compensation in France closely resembles maintenance also because identical standards apply for the granting of maintenance and compensation. A third difference is the object of the regulation: although the object of the regulations resembles each other at first sight (France: bringing into balance of the property rights position of the former spouses; Denmark: providing means to redress (economically) unfair situations), it must be kept in mind that in Denmark exceptional situations are involved. The court may only derogate from what the parties agreed and grant compensation to either spouse so as to prevent an unreasonable financial situation.

Both compensation regulations correspond to this extent that, both in France and in Denmark, the courts may only grant compensation when either spouse so requests. Moreover, in both systems no remedy lies against compensation granted by the court.

**Impact of maintenance/compensation on division of marital capital.** In all studied systems the spouses may draw up a divorce covenant. In Italy the spouses need to have reached agreement a.o. on their property rights situation in case they elect shorter divorce proceedings. According to the doctrine this will include both the division of the marital capital and possible provisions for maintenance. In Denmark, on the other hand, the spouses need not to have reached agreement on the division of the marriage-related property when they opt for administrative proceedings as long as they agree a.o. whether or not maintenance and/or compensation will be paid. However, in their divorce covenant they may also agree on a division of their marriage-related property aside from provisions with regard to maintenance and compensation. In France, in the case of a divorce on their joint petition, spouses may certainly provide in their divorce covenant for maintenance and compensation aside from making provisions for the division of their marriage related property. In other cases this is uncertain. In Germany it is also possible to provide in a divorce covenant for a renunciation of the right of maintenance when determinate capital items (with a fixed yield) are granted.

To which extent the division of their marriage-related property will be affected by an agreement or renunciation of provisions for maintenance in Denmark, Germany and Italy is difficult to state with any precision. However, it is probable that this will have some effect. When spouses in France and Denmark, on the other hand, decide to grant compensation, then, in both legal systems, by definition derogation is made from a division of their marriage-related property under the matrimonial property regime under which they were married.
Impact of the division of the marital capital on the granting of maintenance/compensation. The outcome of the winding up of the marital capital has a direct effect on the financial situation of both spouses and therefore on their needs and financial resources. In all studied systems their needs and financial resources constitute the principal criteria for the basis on which maintenance and compensation is granted. It may therefore be stated that, in all studied legal systems, a division of the marital capital will have an indirect impact on the rights to maintenance. In this connection it is to be observed that, in practice, in Denmark and in Sweden maintenance is hardly ever still granted. These systems aim to arrive at a clean break after a divorce, just like in England.

England. In England there is not only a relationship between the division of the marital capital and the granting of maintenance, it is even quite difficult to keep the issues apart: both form part of the courts' tasks to grant ancillary relief.

3.5. Is account taken of a possible netting or equalisation of pensions when maintenance is granted?

Outline. Only in systems where a (form of) equalisation of pensions is known (Germany, Denmark and England) account is taken indirectly of maintenance that is granted. In France, however, account is taken of a possible pension-loss when determining the needs and financial resources. In Denmark and Italy former spouses who are entitled to maintenance are, in specific instances, entitled to (a part of) the pension of their deceased former spouse.

After divorce. In Germany with its quite elaborate system for equalisation of pensions and in Denmark where only a capital-pension falls in the community which is to be divided, the division of the pension will have an impact on the needs and financial resources of former spouses and therewith, indirectly, on the granting of maintenance. In Germany, moreover, this will apply only if the spouses receive a pension at the time of their divorce. In England where, at a division of the marriage-related property, account is taken in different ways of the (loss of) provisions for a pension, the courts may utilise maintenance payments as an instrument for bringing the pension position of both spouses into balance. Neither in France nor in Italy will any pension equalisation take place. In France, however, the law explicitly provides that, for
the purpose of determining the needs and financial resources for maintenance, account must be taken of a pension loss, if any.

After the death of the former spouse. Both in Denmark and in Italy a former spouse is entitled, in specific instances, to (part of) the old-age pension of the deceased former spouse. One of the conditions in both systems is that the first-mentioned former spouse was entitled to maintenance. It is remarkable that the provisions in Denmark only apply to the wife. In Italy these provisions apply both in respect of the husband and of the wife.

Furthermore Italy, as the only country in the studied systems, has provisions for maintenance for a needy former spouse from the estate of the deceased former spouse. When determining whether a former spouse is needy, the courts must a.o. take into account any possible pension payment stemming from the deceased former spouse.
4. What is the position with regard to the property rights of the spouses when one of them is in the position of being bankrupt?

Outline. In the countries (Denmark, France, Italy and Sweden) with a regime of a (deferred) matrimonial community of property, the bankruptcy of either spouse puts the (deferred) matrimonial community of property at risk and requires that the other spouse be protected. Protection takes place by dissolution of the deferred matrimonial community of property either by operation of law (Italy) or on the application of the spouse of the bankrupt (Denmark and France). Protection in Sweden is achieved by the court having the possibility to decide that no matrimonial community of property will arise on the dissolution of the marriage otherwise than as a result of the death of either spouse. On the other hand, in systems without a (deferred) matrimonial community of property (Germany and England), the bankruptcy of either spouse has no effect, in principle, on the property rights’ position of the other spouse. But also in these systems the other spouse appears to enjoy protection in some instances. In England there are special rules for the protection of creditors in the case of bankruptcy of their debtor.

Systems with a matrimonial community of property; protection of the spouse of the bankrupt. In Italy, Denmark and France the spouse of a bankrupt is protected because the (deferred) matrimonial community of property is or can be dissolved. In Italy dissolution will take place by operation of law in the case of bankruptcy, at which time, also by operation of law, the system of exclusion of any community of property (separazione dei beni) will replace the statutory regime. In France and Denmark the spouse of the bankrupt may apply for a dissolution of the matrimonial community of property or, as the case may be, of the deferred matrimonial community of property. The situation in Sweden is different: the Swedish courts have the possibility to provide that no community of property will arise on the dissolution of the marriage otherwise than as a result of the death of either spouse.

In the case of dissolution during the marriage (Denmark, France, Italy) the matrimonial community of property must be divided. In that case the creditors of the bankrupt will only have recourse against the private capital of the spouse/debtor and on his or her share in the matrimonial community of property. The share of the other will, in principle, remain protected. It is to be observed, however, that the spouse/non-debtor in France will also be
liable after dissolution of the matrimonial community of property for one-half of the community debts which were not contracted by him.

In Sweden, on the other hand, the property rights’ position of the spouses remains unaltered as long as they remain married: there are only two private capitals (that of the husband and that of the wife). Creditors may only have recourse against the capital of the bankrupt.

In France and Italy the dissolution of the matrimonial community of property during the marriage as a result of the bankruptcy must be published.

Regimes without matrimonial community of property; protection of the spouse of the bankrupt. In systems without a (deferred) matrimonial community of property the bankruptcy of either spouse has no consequences, in principle, for the property rights’ position of the other spouse. In such systems each spouse will be liable only for the debts which the spouse contracted while recourse for these debts is only possible on his or her capital.

However, also in these systems without a matrimonial community of property the spouse of the bankrupt will in some instances be protected. In Germany a netting takes place at the end of the marriage. The spouse of the bankrupt is protected there because the final capital may never be negative, which entails that the spouse of the bankrupt can never be forced to pay out more than one-half of the accrued capital to the other spouse. In England the only protection consists of the right of the spouse of the bankrupt to continue to live in the matrimonial home. In case of bankruptcy, the trustee in bankruptcy will seize the entire capital of the bankrupt which may include his or her interest in the matrimonial home. The trustee in bankruptcy may apply to the courts for an order for sale of the matrimonial home. In its decision the courts must balance the interests of the creditors against those of the family of the bankrupt. In the interest of the family the courts may decide to postpone a sale of the matrimonial home. However, if more than one year has lapsed since the adjudication of bankruptcy the court must give preference to the interests of the creditors.

England; special protection for the creditors of the bankrupt. Creditors in England have the possibility to nullify specific transactions entered into by the creditor at too low a price with the intention to defraud creditors. If the debtor is declared bankrupt, the trustee in bankruptcy may lodge a petition for nullification of transactions which have taken place within a five year period prior to the adjudication of bankruptcy (without it being necessary to
prove any intention to defraud creditors). If, however, the transaction has taken place more than two years prior to the adjudication of bankruptcy, it may only be nullified if the transaction has been the cause of the insolvency or if the debtor was already insolvent at that time. There will be a presumption that this condition is fulfilled, when the transaction took place with a partner, which includes both the spouse and a former spouse.

**Bankruptcy after dissolution of the marriage.** In systems without a (deferred) matrimonial community of property no distinction is made, in principle, between a bankruptcy arising prior to and after dissolution of a marriage. However, it is to be observed that in England the right of the bankrupt’s family to remain in the matrimonial home is protected during the marriage and that, in Germany, the bankrupt is protected because he or she will no longer need to pay more at the time of the Zugewinnausgleich than will be available as capital (also when he had the largest capital accrual at the time of the divorce).

In systems with a matrimonial community of property during the marriage the creditors are, in principle, in the same position as before and after the dissolution of the marriage as their right of recourse is not altered. In systems with a deferred community of property one could question whether the bankruptcy has other consequences after the dissolution than when the bankruptcy took place prior thereto. However, this is not the case. Both during the marriage and after its dissolution the spouses only remain liable for debts which they themselves contracted while recourse for such debts will only be possible against their capital (in this case their private capital and their share in the matrimonial community of property).
5. Which leeway do the courts have at the division of the matrimonial capital?

5.1. To which extent do the courts have leeway to derogate from the rules of the statutory system?

Outline. At the division of the matrimonial capital the English courts - different from the continental courts - have wide discretionary powers. Of the continental courts only the Danish, German, Swedish and, to a certain extent, the French courts have limited discretionary powers to derogate, in specific instances, from the statutory system. In one instance the Italian court is free how to decide the matter.

Great discretionary powers. Otherwise than in the studied continental systems there is no statutory matrimonial property law system under English law so that, for that reason, it is not possible to state that the English courts are free to derogate from the rules of the statutory system. However, it can be stated that at a division of the matrimonial capital the English courts - different from the continental courts - have quite wide discretionary powers. The law and case-law provide the courts with such leeway and give some guidelines.

On the basis of the law the courts may, when providing for the division of the matrimonial capital, give two kinds of order: financial provision orders and property adjustment orders.

When determining such measures the courts must take into account all the circumstances of the case and, in particular, the welfare of minor children, if any. Apart therefrom, the law mentions eight specific circumstances to also be taken into account. From a study of the practice it appears that the courts make a wide use of their discretionary powers and are guided by two aims, in particular: in the first place the courts will try to seek a fitting solution for the maintenance and for the accommodation of the children and, in the second place, they will seek to make provisions that will meet the needs of each spouse after the dissolution of their marriage.

By law the courts are obliged to consider the possibility of a clean break, if this is reasonable having regard to the circumstances of the case. Furthermore, the so-called one-third principle was introduced in case-law according to which principle the wife will receive one-third of the matrimonial capital and the husband two-thirds.
**Limited leeway.** Of the continental courts only the Danish, German, Swedish and, to a certain extent, the French court have limited powers to derogate in specific instances from the statutory system. In one instance the Italian court was given some leeway.

Both in Denmark and in Sweden the courts may determine a different division than a division in equal halves, if the latter appears to have unreasonable consequences. This is the case in both countries, if either spouse has contributed a considerably greater share to the matrimonial community of property than the other, if the duration of the marriage was particularly brief and it did not actually result in any financial community.

In that case, in Denmark, before a division is made each spouse will take from the matrimonial community of property the share in the capital which corresponds with the value of the assets which he or she contributed to the marriage or acquired during the marriage pursuant to an inheritance or gifts and which he or she transferred from his or her private capital to the matrimonial community of property.

In such cases in Sweden the courts have the possibility to grant the spouse who contributed most to the marriage a larger share in the matrimonial community of property.

In France the courts, at the division of the marriage-related property, may grant either spouse a *prestation compensatoire* at the request of a spouse and at the expense of the other spouse so as to balance the property rights’ position of the former spouses (see also under 3.4). However, this *prestation compensatoire* is in practice usually made in the form of a periodic payment and, in fact, hardly differs from maintenance payments in the other examined systems.

In one specific field, namely the granting of the right to live in the matrimonial home and the division of the household effects, the German courts have quite wide discretionary powers. For instance, they may, in certain circumstances, grant the spouse/non-owner the matrimonial home and/or specific household effects. In this field the Italian *Corte di Cassazione* has restricted the freedom of the court considerably: the courts may now, in fact, only grant the right to live in the matrimonial home to the spouse who is given the care of the minor children or with whom children of age cohabit when, without their fault, they are not able to provide in their own keep. The sole leeway which the court in fact has consists of the possibility to grant a right of usufruct to either spouse, if the maintenance and upbringing of the children so require.
5.2. To which extent do the courts have any leeway to derogate from the marriage contract entered into by the parties?

**Outline.** English law already differs, in the first place, from the continental systems because marriage contracts are unknown as contracts which are subject to a specific matrimonial property law between the spouses which regulate their property rights relations during and on termination of the marriage. This does not mean that spouses in England may not enter into contracts on their property rights situation. Different from in continental systems, such contracts are, however, subject to principles of general contract law. Moreover, the English courts, different from their continental counterparts, have far-reaching rights to derogate from such contracts at a division of the marriage-related property, except when the contracts are incorporated in a *consent order*.

From the continental courts only the Danish, German and Swedish courts (and in a certain sense the French courts), have the power, in specific instances and on certain grounds, to derogate from marriage contracts agreed by the parties.

**Quite extensive freedom.** The law gives English courts the power to vary a contract made between the spouses at the time of the divorce by a *property adjustment order*. The courts may grant an advantage to one of the spouses (or to their children) or it may reduce an advantage arising from the contract or strike it altogether. In 5.1 the circumstances were already described which the courts must and will take into account when deciding on such measures.

The spouses may avoid that derogation be made from a contract which they enter into at a division of the marriage-related property by requesting the court to incorporate their contract in a *court order*. When there is no reason for any further examination, the courts may adopt a *consent order* exclusively on the basis of the information which the spouses provide together with their request. When a contract made by the spouses is incorporated in a *consent order*, the court may not derogate from such contract at the time of the divorce.

**Limited freedom.** In Denmark and Sweden the courts may only derogate from marriage contracts made by the parties in specific instances. A first condition is that the marriage contract excludes capital from the (deferred) matrimonial community of property. Further, the principle in Denmark is that a court may only intervene when necessary to avoid a financially unreasonable situation. In Sweden an additional condition applies that the agreement of the
spouses was unreasonable. Factors which are taken into account by the courts (duration of the marriage, financial position of the spouses, etc.) do not differ greatly in Denmark and Sweden. However, different from in Denmark, Swedish courts must take into account, in particular, the circumstances at the time when the contract was made. Where the spouses knowingly and wilfully entered into the contract, the courts must take a reticent attitude when determining whether there was unreasonableness. The starting point is that what the parties agreed will be binding. On the other hand, in Denmark there is a clear trend in the direction of the application of a general rule of fairness, especially in instances in which the marriage is of a long duration and the spouses excluded their entire capital from the (deferred) matrimonial community of property. The weaker party does not necessarily be in an unreasonable financial situation in such instances.

In Denmark the courts may derogate from the marriage contracts by granting one of the spouses an amount to be paid by the other. In Sweden the courts may vary or disregard marriage contracts. Differently from the Swedish courts, Danish courts may only proceed to the abovementioned correction of the marriage contract, if so requested by either spouse. Where the spouses opt for administrative divorce proceedings the spouses must first reach agreement in their divorce covenant on a possible compensation arrangement.

As mentioned hereinbefore in paragraph 5.1, French courts may grant either spouse, at the expense of the other, a prestation compensatoire at the winding up of the marriage-related property, while German courts have more extensive powers as regards the granting of the matrimonial home and household effects. In both systems this applies not only in the case the former spouses were married under the statutory regime but also when they were married with a marriage contract.
III. Explanation

In general, it is not simple in a study of comparative law to provide an explanation for any corresponding and different solutions in the various studied legal systems. One of the reasons for this is that there are many factors which are of influence and which may correlate while some are sometimes unclear or unknown. Factors which may have influenced the choice of a certain solution are: the historical development of the system, the social background, the political and social climate at the time when the solution was introduced and, of course, the impact of the other systems when a choice was made. One must e.g. also think of the position and influence of the courts in and on a system and whether or not there is a notariat.

Having regard to the objects of the study and the available time-span we limit ourselves in this explanatory chapter to some outlines. We will specifically deal with the impact which the systems have had on each other and the considerations of the legislator when the current matrimonial property law was introduced.

Aim of equality between husband and wife. Under the influence of the social and political climate and regulations of supranational organisations all studied systems now have a system of matrimonial property law which do justice to the equality of the sexes. However, this was not achieved simultaneously. Already in 1882 a statute was introduced in England for such non-discrimination. Prior to 1882 the spouses were considered to form a unity which, in practice, consisted only of the husband. In the Scandinavian systems new legislation was introduced in the Twenties of this century in which instance the dominant position of the husband in the marriage not maintained. The other studied systems only followed later. For a number of these systems (especially the German) the Scandinavian systems served as a model for inspiration. In 1957 the statutory system of Zugewinngemeinschaft was enacted, notably by enactment of the Gesetz über die Gleichberechtigung von Mann und Frau auf dem Gebiete des bürgerlichen Rechts. In France matrimonial property law was revised in two stages: the first amendment of the law took place in 1965 and the second in 1985. In both instances the wish for (more) emancipation of married women was the principal motive for the changes. At the second amendment of the law the fact that two supranational bodies had issued regulations in this field also played a role: in 1978 the Council of Ministers of the Council of Europe and in 1979 the United Nations. In Italy an overhaul of family law took place in 1975. Also in Italy the aim of equality between the sexes constituted the principal motive for this overhaul.
Prior thereto the Constitutional Court in Italy had repeatedly pointed out in its decisions that a number of provisions were unconstitutional (breach of article 29, paragraph 2 of the Constitution: ‘The marriage is based on the moral and legal equality of the spouses …’).

Safeguard of the independence of the spouses. Since 1882 marriages in England have not or hardly ever had any influence on the property rights position of married persons as long as the spouses remained married. During the marriage each spouse therefore keeps his or her private capital, so that there are two capitals, the capital of the husband and that of the wife. The same applies in the Scandinavian systems and in the German system. The German legislator was particularly inspired by the Scandinavian example when opting for this solution. In all of these systems the thought predominated that the equality and independence of the spouses could best be expressed and protected in a system without community of property, as no complicated arrangements for the management and administration would then be necessary, while each one’s capital would, in principle, not be affected by transactions of the other.

In France and Italy, on the other hand, it was preferred to create a matrimonial community of property during the marriage. In France this took place under the influence of public opinion. In the first draft-Bills for amending the law of French matrimonial property law the legislator had drafted a system without any matrimonial community of property, whereby any accruals would be netted at the dissolution of the marriage (*participation aux acquêts*). However, when it appeared in 1962 from an investigation made amongst the French population that the French very much favoured the idea of a matrimonial community of property during the marriage, the draft bills were amended: a choice was then made for a system with a limited matrimonial community of property during the marriage.¹

On the other hand, in Italy a separation of property (*separazione dei beni*) was in force as statutory system prior to the change of the law in 1975. A statutory system was introduced there, especially in order to value the work in the household from an economic point of view, which resembled both the French, Scandinavian and German systems: specific assets fall in the community already during the marriage, while other assets fall in the community, to the extent that these were not consumed, after dissolution of the marriage, while for a third category of assets only the accrued value falls into the community. Moreover, Italy had the

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¹ Several polls took place under the population, the first in 1962 and the second in 1979. At both polls it appeared that the French population were attached to a matrimonial community of property during the marriage. In 1962 a poll was also held under notaries and representatives from employers (including the banking industry).
French system of *communauté des meubles et acquêts* as a statutory optional system already since 1942.\(^2\) In practice it was hardly ever chosen.

**Protection of the housewife.** At the end of the marriage the economically weaker party shares in the accrued capital of the other spouse in all of the studied systems. The reason for this is the same in all systems: the protection of the housewife. The work of the wife who takes care of the household should be valued equally as paid work. However, the manner in which this is achieved differs per system.

In Denmark and Sweden a community of property arises at the end of the marriage. In France a matrimonial community of property, which changes to undivided marital property after the dissolution of the marriage, already commences during the marriage. In Italy there is a community of property both during and after the dissolution of the marriage. The undivided marital property which arises after the marriage is divided in equal halves in these four systems. The differences between the systems mainly consist in there being a community or no community during the marriage. These differences were explained in the preceding Paragraph.

The German and English solutions vary more, both as regards the aforementioned four systems and in respect of each other: in Germany the accrual is netted and in England the courts are granted the power to divide the marriage-related property of the spouses in a reasonable manner. We are unaware why netting of the *Zugewinn* was elected in Germany and not e.g. a deferred community of property. Possibly it was considered more practical to only divide the accrual of each one’s capital and not the assets themselves. This explanation is plausible in the light of the fact that the German legislator clearly considered it important that the system was manageable.\(^3\) The English solution is an isolated one in the light of the tradition of *common law* systems which, greatly simplified, are based on the thought that fairness is more important than legal certainty. The social context is also mentioned as a reason why stricter rules would not be fitting for England. In England it is said by the most authoritative judge in this field that a system like the Danish and the Scottish system (which correspond in many respects) may be suitable for small societies with a relatively homogeneous population but not for the English society with its population consisting of the very poor and the very rich. Standard rules would not fit for the enormous fortunes which may be at stake in divorce proceedings in England.

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\(^2\) Traditionally, Italian private law is strongly linked with the French private law.

\(^3\) See chapter Evaluation under the criterion for evaluation of managability.
Increasing participation of the wife in the work process. As a result of the increasing participation of the wife in the work process the question was raised in the various studied systems whether the chosen statutory systems still have a raison d’être. Opposed to this, it is argued that although the participation of women in the work process during the last decennia has decidedly increased still less women than men work in the countries of the European Union while women, moreover, work on an average less hours per week. Moreover, so it is stated, two breadwinners may always agree a regime in their marriage contract which suits their situation best.

Autonomy of the parties. In all studied continental systems the spouses have autonomy, to a greater or lesser extent, but in general to quite a large degree to regulate their property rights situation. The reason for this is clear: society changes and the characteristics of the spouses differ mutually. The spouses must at least be able to adjust the statutory regime. On the other hand, spouses in England may enter into contracts in respect of their property rights, but in the case of a possible divorce the courts are in no way bound to such contracts. The background is that it is considered unreasonable that the spouses are bound e.g. after a marriage of long duration to a contract which had been entered into by them thirty years earlier. This constitutes a difference, too, between the English system and the studied continental systems; their idea of what is fair is considered more important in English law than legal certainty. In particular instances, moreover, this is also the case in Denmark and Sweden: when the spouses in these systems exclude capital from the deferred community, the courts may derogate from what was agreed by the parties on the basis of reasonableness and fairness. We are not aware whether there is a relationship between such discretionary powers of the court to make an adjustment and the absence of a notariat in Denmark and Sweden. One could say that these discretionary powers to vary their agreement is necessary for spouses who did not benefit from information which a notary could have provided when they made their marriage contract. One could counteract this by stating that the role of a notary in these systems is often fulfilled by a lawyer. It remains a fact, however, that spouses in these systems can also enter into contracts on their property rights situation without a lawyer.

Protection of the family capital. With the exception of Denmark and Sweden, assets which the spouses already possessed prior to their marriage and which they acquired during the marriage pursuant to an inheritance or from gifts are excluded in all studied systems from what must be divided. It is known that the French solution was selected because France is greatly attached to family capital. Probably this will also apply to other systems which excluded such family capital from the property that must be divided. This is certainly the case in England. There the courts will certainly take this into account at the division. Where this capital is the only capital that can be divided and/or it is in the interest of the children that the matrimonial home is allotted to the spouse/non-owner, the courts will most probably divide such capital or, as the case may be, allot this to the other. The reason given why such capital will fall in a deferred community of property in the Scandinavian systems is mainly of a practical nature: it would simplify the determination and evaluation of what must be divided at a dissolution of the marriage.

Common historical origin. That the Danish and Swedish systems in the field of family and matrimonial property law resemble each other so closely is caused by the fact that these systems have one common ancestor: the common standard Marriage Code of Denmark, Finland, Iceland, Norway and Sweden of 1920. In Sweden, however, this Code was replaced in 1988. Also in Denmark the matrimonial property law overhauled during the Twenties. Although the systems have constantly diverged, the influence of their joint origin is still clearly seen in outline.

Connexity with inheritance law. Marriages nowadays seem to end more often by the death of either spouse than by their divorce. The explanation for certain choices of the various legislators may (also) be based on considerations in respect of the position of the surviving spouse and the other heirs. In this study we have limited ourselves to matrimonial property law. However, one must keep in mind the strong connexity of matrimonial property law and inheritance law.

IV. EVALUATION
An evaluation of the selected solutions in the studied regimes of matrimonial property law is made on the basis of eight criteria: whether it is just, provides for equality, is manageable, simple, flexible and whether it protects the spouses and third persons and, finally, their ‘common core’. The criteria ‘flexibility’ and ‘protection of the spouses’ have both been subdivided into two subcriteria: autonomy of the spouses and the discretionary powers of the courts or, respectively, protection of the spouses vis-à-vis each other and protection of the spouses vis-à-vis third persons.

**Is the system just?**

**Is the system just?** A ‘just regime of matrimonial property law’ is a regime which does justice both to the spouses as independent and equal individuals and to spouses who form a unit as individuals who have engaged themselves to mutual solidarity.¹

In the first place we consider it just that the spouses will divide what they built-up by their joint efforts during the marriage when the marriage is dissolved. The term 'capital built-up by their joint efforts' must be construed broadly and does not only include the financial contribution made by each spouse but also the contribution resulting from the care of the household.²

In the second place, we believe that, as a principle, a division in equal halves should be made on the foregoing basis, although exceptions to such principle should be possible in special instances.

Thirdly, in our opinion it follows from this that during the marriage, on the one hand, assets which may be divided later should be protected and, on the other hand, that neither spouse must be restricted too much in their power to dispose of his or her capital.

**At a dissolution of the marriage; composition of the divisible ‘masse’.**³ In the studied systems two categories may be distinguished: regimes with a broad divisible ‘masse’ and

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¹ Verbeke (1991, p. 397-421) in his thesis refers to a balance between individuality and solidarity. When considering and reviewing the criterion whether regimes are just we have made grateful use of Verbeke's thesis.
² Verbeke 1991, p. 400
³ Verbeke 1991, p. 405 *et seq.* The term 'divisible masse' includes both the undivided marital property, which must be divided at a dissolution of the marriage and whatever must be included at an equalisation. The term used here also refers to capital the courts may use for an adjustment of the property rights of the spouses at a dissolution of their marriage.
systems with a limited divisible ‘masse’. Denmark, England\textsuperscript{4} and Sweden belong to the first category: in these countries the entire capital of the spouses forms part, in principle, to the divisible marital property. For that reason, no distinction is made, in principle, as to the manner or date on which the capital originated. This divisible marital property specifically includes whatever the spouses already possessed before their marriage or what was acquired during the marriage as a result of an inheritance or gifts. In France, Italy and Germany the divisible marital property is, however, limited to what the spouses actually built up during their marriage. The capital contributed at or acquired during the marriage as a result of an inheritance or gifts forms part of the spouses’ private capital and is not taken into account at a division.

As, like mentioned hereinbefore, we consider it just that whatever the spouses have built up\textit{ during the marriage} by their joint efforts is divided amongst them when the marriage is dissolved, we prefer the last mentioned systems.

However, the German system has the disadvantage that the entire capital built up during the marriage is not divided in some cases. In Germany equalisation takes place at the end of the marriage. The final capital and initial capital are compared. The spouse with the greatest accrual of capital must pay to the other one-half of such accrual. However, unless the spouses have otherwise agreed, the initial capital may never be negative. Supplementation of a negative capital will therefore not be considered as an accrual, in principle, so that it will not be taken into account as divisible marital property.

On the basis of the French, Italian, Swedish and (to a limited extent) Danish system certain non-transferable rights which are closely connected to a spouse fall outside the marital capital which is to be divided. This may also be considered unjust. This question plays a role in particular for the pension rights and claims of the spouses. Pension rights and claims are, it is true, tied to the spouses’ person but belong, at least partly, to the capital built up during the marriage. Even more so, they often constitute one of the principal capital components. Not to take into account its value will not do justice to the mutual solidarity between the spouses and cannot be justified in our opinion by claiming that this falls within the autonomy of the spouses. In France, Italy and Sweden the pension falls outside the divisible marital property, which solution may not be considered just as there is also no provision requiring equalisation.

\textsuperscript{4} It is to be observed that the courts in England try to take into account that certain capital components belong to a spouse prior to the marriage. In principle it may be stated that the courts will try to allot this capital to its owner. However, if nothing else remains, also that capital may be allotted to the spouse/non-owner.
In Denmark a distinction is made between the various types of pension. A Danish ‘capital pension’ falls in the community of property which is to be divided while this is not the case for the other pension rights and claims, which may lead to an unreasonable outcome. The situation in Germany and England is better as there will then be an equalisation of pension rights at a dissolution of the marriage. Nowadays it is only possible in England to still provide for equalisation at the time of retirement of the person who is entitled to a pension. In future it will be possible to regard the built-up pension just as any other capital component, so that it may be divided between the spouses at the time of their divorce. Such a solution will respect the individuality of the spouses because it will make a *clean break* at a divorce more likely.

**Division.** On the one hand, it is desirable that both spouses share in the divisible masse and that there are clear rules safeguarding such a division. On the other hand, it is also important that the property rights position of the spouses will end as soon as possible and that the manner of division will provide sufficient flexibility for the realisation of a clean break and reduce the number of cases in which maintenance will be necessary.

The systems dealt with here may roughly be divided into two categories. In the one category fall all continental systems in which, in principle, a division in equal halves will be made, while the other category consists of the English system in which the courts will decide what the spouses will acquire according to fairness.

It may be stated that more weight is attached in the continental systems to legal certainty while in England flexibility is given more weight. The question is which of the two is to be preferred. Where the presence of strict rules on the manner of division promotes legal certainty and legal equality, the flexibility of English law makes it possible to take all the circumstances of the case into account and increases the likelihood of a *clean break*. It seems that the best solution may be achieved by a combination of the two systems, that is a system which, in principle, provides for an equal division of the divisible masse while the courts have the possibility to derogate from such a principle where this may be necessary to arrive at a just solution. As the English system may be regarded as too flexible and too uncertain and the German, French and Italian system as too strict, the most fitting system would seem to be a manner of division *à la scandinave*: a combination between the principle of an equal division with the possibility of an adjustment by the courts.

**During the marriage; protection of the divisible masse.** In order to safeguard that both parties will be able to share in what was built-up through their joint efforts, the divisible
masse must be protected. Such measures for its protection must, however, not encroach too much on the autonomy of the parties. England, which gives preference to the autonomy of the spouses, gives no protection at all to the divisible masse. Only the right of accommodation of the spouse/non-owner is protected. On the other hand, France and Italy have the most far-reaching protection. Both spouses jointly must perform important (in the sense of far-reaching) legal acts in respect of the matrimonial community of property. This results in (too great) a restriction of the autonomy of the spouses. In Denmark, Sweden and Germany an intermediate solution was chosen: the divisible masse is protected because determinate transactions may not be performed by a spouse alone without the consent of the other spouse and because a spouse is not entitled to act contrary to the interests of his or her spouse. This intermediate solution is to be recommended.

**Equality between husband and wife**

**Equality.** A system or matrimonial property law may not discriminate spouses on the basis of their gender. Equal rights and equal duties must be granted or imposed, as the case may be, on husband and wife.

**Equal rights.** In all systems the dependent position of the married wife resulted, until the end of the previous century, in her not having the right to freely dispose of her capital and that the husband had the right to administer the same. Nowadays the situation is entirely different: both spouses in all systems that we have dealt with now have the right to both administer and dispose of their capital. This applies both in systems where there is only private capital and in systems with a matrimonial community of property (France and Italy). In the latter case both spouses may dispose of the capital which forms part of the matrimonial community of property and, in principle, each will administer this severally. It is a form of concurrent administration. Aside therefrom, each spouse has the right to give his or her views as regards specific important legal acts. A number of important acts, especially which concern the marital home, must take place jointly in all systems. These restrictive provisions on the rights of the spouses to severally dispose of their capital do not breach the equality principle as they apply to both spouses.

**Equal obligations.** In all studied systems the rule is that both spouses must contribute to the cost of the household. As contributions will include both financial income and the care of the
household, it is safeguarded in these systems that the person who undertakes such household duties may discharge such obligation.

However, an observation must be made about the Danish system in which the husband is always still liable for debts contracted by his wife for her personal needs. There is no similar obligation incumbent on the wife.

English law also still has remnants of rules for the protection of the wife: if an asset was put in the name of the wife while financed with monies of the husband or of both spouses, the wife will acquire full title of ownership to the asset, that is to say both equitable ownership and legal ownership. It will be presumed that this will constitute a gift from the husband to his wife, based on the existence of a natural obligation. However, if the asset was put in the name of the husband while it was financed with monies stemming from the wife or from both spouses, no such a presumption will apply. The husband will then only acquire legal ownership while the equitable ownership will remain with the wife or will vest in both spouses.

**Equal rights after dissolution of the marriage.** The principle of division in equal halves applies in the studied continental systems which results in both spouses sharing in the divisible masse. In England the spouses must trust the courts. In general, it may be stated that in all systems the spouses will receive equal treatment at the division. However, an observation must be made as regards the division (granting) of the matrimonial home. The granting of the matrimonial home is often linked to the parental authority. Having regard to the fact that the parental authority or the actual care is more often granted to the mother than to the father, the matrimonial home will also more often be allotted to the wife rather than to the husband. If the allotment is made under the condition of compensation payable to the other party this will not constitute a breach of the required equality between husband and wife, at least from a proprietary rights respect. Where it is made without compensation, like is the case in Italy and could be the case in England, then this will cause the wife to have an (indirect) benefit.

In addition, it could be observed, although we now leave the field of matrimonial property law, that the courts still act very reservedly when granting maintenance to the husband. A similar observation may be made as regards the right of the courts in the Scandinavian

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5 In England the courts may allot both the title of ownership to the home and a right to live there. In Italy it is only possible for the courts to grant a right to live in the matrimonial home.

6 Without taking into account the sentimental value of the previous matrimonial home.
systems which are dealt with here, namely to grant compensation to the financially weaker party in instances in which the spouses have agreed a complete or partial exclusion of any community of property. For, such a compensation will seldom be granted to the husband. The latter observations do not refer to failure of the legislator to provide for such situations but to an (unconscious) discrimination on the part of the courts.

Finally, an observation must be made on the possibility for the former wife, under certain circumstances, to obtain a widow’s pension in Denmark after the death of her former husband. This will also constitute a benefit for the wife. For, a former husband will not have such a right in Denmark.

**Simplicity**

**Simplicity.** The simplicity of a system of matrimonial property law will depend, on the one hand, on the simplicity of the system for the spouses themselves and, on the other hand, of the simplicity of the system for the persons who administer the system (namely the courts). For the spouses it will be of importance whether they may independently dispose of their capital during the marriage. A system will be more simply manageable when the spouses are more free in their activity. We assume that the contrary will apply to the courts: the more the courts are confronted with open standards and unclear rules, the less simple it will be to manage the system. Whether the courts prefer to be bound in a particular way to strict standards is, in our view, quite another question. Here we only presume that strict standards will be more easily manageable.

**Restrictions in the management and administration.** Within the English system the spouses are quite free to dispose of their capital, the sole restriction being within the ambit of the right to live in the matrimonial home. The spouse/owner may possibly be limited in the freedom to dispose of the home, if the spouse/non-owner is protected by a matrimonial home right or a beneficial interest in the home.

As regards the studied continental systems one would, at first sight, possibly expect that the matrimonial community of property systems during the marriage are considerably less simple to apply for the spouses than for spouses without a community regime during the marriage. The differences are, however, less great because, on the one hand, the independence is limited in a number of ways in systems without any matrimonial community of property during the marriage, while, on the other hand, in systems with a matrimonial community of
property each spouse may act alone as regards his or her private capital and as regards the daily acts in respect of the assets which form part of the matrimonial community of property.

At a closer look at the various provisions regulating the management and administration one can say that the flexibility of systems with a deferred community (Denmark and Sweden) is somewhat limited, in the first place because a spouse may not without the consent of the other spouse considerably reduce his or her share in the (deferred) community; in the second place, in these systems one may neither dispose of the matrimonial home nor of the household effects without the other’s consent. In this case the flexibility of the Swedish system is restricted more than in the Danish system as the applicable provisions in Sweden, different from in Denmark, are of a mandatory nature and also apply if the matrimonial home or the household effects, as the case may be, form part of the private capital of the spouse who disposes of the same. Furthermore, the consent regarding the matrimonial home in Sweden, different than in other systems, must be recorded in writing.

For practically the same reasons as apply in the Swedish system, the French system is less simple to manage for the spouses compared with other systems: a spouse may not, without consent of the other spouse, even when it concerns the own property of the spouse dispose of the matrimonial home and household effects. However, the consent does not require any formality. In France common assets may not be alienated gratuitously without the consent of the other spouse. The consent of the other spouse must also be obtained for important or, as the case may be, risky legal acts as regards common property for a valuable consideration. In Italy the consent of the other spouse must be obtained for legal acts as regards common assets which are considered extra-ordinary (disposing of the matrimonial home will fall hereunder). The system is, however, more flexible than the French system as the rule will apply only for common assets and not when the matrimonial home forms part of the private capital. Moreover, no separate rules apply in respect of household effects. However, entry into contracts where personal rights of enjoyment are acquired or provided are considered extra-ordinary acts of administration.

In Germany there is no community of property either during the marriage or at its dissolution. Equalisation takes place at the end of the marriage. In order to protect the accrual which must be equalised and household effects the power of the spouses to dispose of the private capital is limited during the marriage in two instances: a spouse may not, without the consent of the other, dispose of (virtually) his or her entire capital (85%-90%) or assets which form part of the household effects.
In conclusion, one may say that under the English system the spouses have most rights to freely and autonomously dispose of their capital. The results of the restrictions in the management and administration in continental systems do not vary strongly; the freedom of movement of the spouses may be qualified as quite reasonable. When one compares the continental systems mutually, the French system seems the most difficult to manage for the spouses, followed by the Italian and Swedish systems. The German system has the least restrictive provisions in respect of the management and administration and would therefore seem more simple in practice than the other studied continental systems.

**Strict and open standards.** Both during the marriage and at the division of the marriage-related property the English system, of the studied systems, has the most open standards which allow the courts great leeway but which, at the same time, do not make it simple to apply the system\(^7\). Only highly qualified judges will be able to properly work with such a system. Moreover, it is very time-consuming and costly.

In the other systems there are, in general, rather strict rules. There are exceptions in Germany when rights to the matrimonial home are granted and in respect of the household effects, and in Denmark, France and Sweden where the courts are granted limited discretionary powers in dividing the marriage-related property of the spouses\(^8\). As this will be either a broad discretionary power in a limited field or a limited discretionary power in a broad field, this will not affect the manageability of the systems concerned.

Especially in the German system, aside from the granting of rights to the matrimonial home and household effects, one could point to some standards which were clearly chosen to improve the manageability of the system. In those instances manageability prevails on purpose over and above what is just.

For instance, it was determined that where the spouses did not otherwise agree the initial capital could not be negative, which means as mentioned hereinbefore that any suppletion of negative capital will, in principle, not be considered an accrual so that it will not fall in the divisible masse.

Furthermore, when something is acquired it is not each time asked whether or not the other contributed thereto. For instance, damages for pain and suffering will be considered part of the divisible masse.

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\(^7\) When considering the evaluation criterion ‘discretionary powers of the courts’ this matter will be dealt with more amply.

\(^8\) See under evaluation criterion ‘discretionary powers of the courts’.
Another rule which enhances the manageability of the system but which may be considered unfair provides that any increase in value of assets which are considered to constitute initial capital, so that they are kept separate from the divisible ‘masse’ (e.g. a parcel of land acquired as a result of an inheritance), will be considered an accrual which is therefore equalised like all other possible assets.

Finally, within the ambit of manageability of the system, not the time of the actual separation but the time at which the divorce petition is lodged has been fixed as reference date for the drawing up of an inventory of the final capital. The latter, however, also applies to France and Sweden as regards the determination of the divisible masse. In Denmark such a reference date is fixed even later: at the time of the dissolution of the marriage.

Simplicity

**Simplicity.** What is simple for one need not be simple for the other. A lawyer will regard a system of matrimonial property law with other eyes than a layman. A lawyer who has already worked for years with a certain system will have a different view than a lawyer from a different system of law who first acquaints himself with a certain system. We do not consider the perspective here of a lawyer who is trained and works within a certain national system of matrimonial property law. From discussions with those lawyers it appeared that none of them, irrespective of the system in which they work, considered his or her system complicated, unjust or inflexible. Such qualifications they may still be willing to use for the statutory system but not that it is complicated.

Although it would be possible to make some observations from the perspective of a layman, we prefer not to take that risk and limit ourselves to our own perspective, being that of Dutch lawyers.

**Simple and complex systems.** When looking at the English system superficially, one may state that it is a simple system: in principle, the marriage does not have any consequences for the property rights position of the spouses. When the marriage ends by a divorce, the courts will divide the marriage-related property according to standards of reasonableness and fairness. However, when one wishes to ascertain how the courts make a division of the marriage-related property, what the role is of the trust, which arrangements there are as regards pensions, what the status is of the various contracts which the spouses may enter into etc., then it proves for a continental lawyer (and also for an English layman) to be quite a
difficult system to fully understand. Even English lawyers seem to regard the trust in particular as quite complicated.

The Danish and Swedish systems may, on the other hand, be regarded as examples of simplicity and clarity. During the marriage the capital of husband and wife remains completely separate. No provisions for management and administration are therefore required. There are only some restrictions in the management and administration for the protection of the living situation and of the deferred community of property. At the end of the marriage virtually the entire capital of both spouses falls into a community of property which must be divided in equal halves. Furthermore, there are few formal requirements with regard to marriage contracts and there are no statutory optional regimes. In Sweden the spouses do not have much freedom in opting for the terms of their marriage contracts while in Denmark many combinations are possible but this does not cause a complication as long as the basic principles are known. Other characteristics, like the limited discretionary powers of the courts when winding up the marriage-related property, are also not complicated.

The three other studied systems all have certain aspects which make the system less simple for foreign (Dutch) lawyers. The concept of the French legal system of communauté des acquêts is simple to understand for a Dutch lawyer who is aware of community of property during the marriage and the fact that this requires specific provisions for the management and administration. Also the idea that there will be undivided marital property after dissolution of the marriage is known to us. What makes the French regulation so complicated are the detailed provisions. There are many exceptions to each principal rule. For each type of case separate rules apply, and each rule is worked out in detail. In Italy this is much less the case. The form of the regulation of the statutory system is much more simple. The contents may be more complex than the French provisions, especially the existence of both a community during the marriage and a deferred community is not simple to grasp. One must keep in mind which assets form part of the private capital, which form part of the matrimonial community of property and which are intended to fall into the deferred remainder community of property. In the German system it is important to realise that neither during nor at the end of the marriage there is a community of property in the case of a Zugewinngemeinschaft and that no assets are divided after dissolution of the marriage but an equalisation takes place with regard to the increase in value of the capital of both spouses. The calculations and the required valuations of the various capital components seem rather complex and time consuming for Dutch lawyers. Most German lawyers with whom we have
talked considered everything quite simple. What even the German lawyers consider complicated are the provisions with regard to the equalisation of pensions.

**Flexibility**

**Autonomy of the parties and discretionary powers of the courts.** Below we will consider the flexibility of the studied systems having regard to two subcriteria: the autonomy of the spouses to enter into contracts with regard to their property rights relationship and the discretionary powers of the courts in the field of matrimonial property law. The systems are each reviewed according to both criteria. However, one should keep in mind that even if the discretionary powers extend to the contracting of a marriage contract and/or mean that the courts may vary or disregard such contract, the discretionary powers can restrict the autonomy of the parties and may even, in actual fact, set these aside. In this connection one must think of the English law whereby the spouses may agree, in principle, whatever they want (they are only limited by the rules of the general law of property, rights and interests), but the courts have the power to vary or disregard such contracts at the division of the marriage-related property. Also in France, Denmark and Sweden the courts may, although to a less extent than in England, derogate from what the parties agreed.

*a. Autonomy of the parties*

**Autonomy of the parties.** Within the ambit of the autonomy of the parties English law takes a special position. For, on the one hand, the spouses are quite free to regulate their property rights (contracts are only subject to the general law of property, rights and interests). On the other hand, the courts have far-reaching powers to vary such contracts or to derogate from such contracts when allotting the marriage-related property. The latter is only different when the contract was incorporated in a *consent order*.

For continental systems the rule applies that the autonomy of the parties, on the one hand, depends on requirements as to form and, on the other hand, as to the degree in which the spouses are free to provide for their property rights as they wish.

**Required form and formalities.** In the studied continental systems the spouses in Denmark and Sweden are least hindered by requirements as to form and formalities for making their marriage contracts prior to and during the marriage. The sole requirement as to the form of the
contract is that it must be in writing. The other studied continental systems require, in principle, a notarial instrument. Specific requirements apply when the spouses in Denmark and Sweden wish to alter their marriage contract during their marriage. The sole special formality with which the spouses must comply is the registration of the marriage contract at the district court and, when the contract relates to immovable property, also in the immovable property register. It is to be observed, however, that although the spouses may themselves draw up their marriage contract, they will often instruct a lawyer to do so, especially when the contracts are rather complicated. The costs involved are rather high compared to those in other continental systems.

Although spouses in France and Italy can comply with publication requirements in a more simple way than in Denmark and Sweden (the existence of marriage contracts is annotated in the margin of the marriage certificates in France when the marriage is solemnised and in Italy, depending on the type of marriage contract, at the solemnisation of the marriage or at the instigation of the notary)\(^9\) a number of requirements are further set which make it less simple to contract or alter marriage contracts. Thus in both systems marriage contracts must be made before a notary, in principle. Furthermore, specific conditions apply for amending marriage contracts during the marriage. In Italy such specific conditions only apply in two cases, which probably do not occur very often. Moreover, making marriage contracts in Italy has been made quite simple in one instance: if the spouses elect a regime of exclusion of any community of property they need only make a declaration before the person who solemnises the marriage. It may further be observed that in the other cases the required notarial instrument hardly causes any obstacle financially: the cost of making marriage contracts is very low in Italy compared to the cost in other systems.

German spouses, so one could say, are restricted somewhat more in making or changing the marriage contracts than in the Scandinavian systems and somewhat less than in France: a notarial instrument is required just as registration of the marriage contracts in the Güterrechtsregister and, possibly, in the immovable property register; for alteration of marriage contracts there are no specific requirements.

**Contents.** With regard to the contents of marriage contracts, the German system is the most flexible: one is fee to opt for any of the statutory regimes with a possibility to adjust any non-mandatory rules when required. Much is possible (inter alia marriage contracts subject to a

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\(^9\) For the rest, in both systems, like in all studied continental systems, marriage contracts relating to immovable property must be registered in the immovable property register.
stipulation as to time). Account must only be taken of mandatory provisions of the general law of contracts and no reference may be made to law no longer in force or foreign law.\(^\text{10}\) In other continental systems the spouses are less free, although in France and Italy a system of one's own design may be contracted.\(^\text{11}\) However, there are also a number of quite considerable limitations e.g. in both systems there is a catalogue of rights and duties from which no derogation may be made and there are a few regimes which are explicitly prohibited. Furthermore, in France marriage contracts with a stipulation as to time are prohibited. The least flexible as regards the contents of marriage contracts are the Danish and Swedish systems in which there is no other optional regime aside from the statutory regime. In Sweden the spouses only have the possibility to alter the composition of the present marital capital. In Denmark the spouses have more possibilities: they may make the composition of each one's capital dependent on the manner of dissolution of the marriage.

In conclusion, it may be stated as regards the freedom of the spouses to conclude contracts in respect of their property rights that English law is very flexible in this field but that, at the division, the contracts between the spouses have little value and are therefore hardly ever made. The other studied systems have a varying flexibility as regards the form, the required formalities and the contents of the contract. As regards the form and formalities, the French system appears to be the least flexible. The Swedish law seems to be the least flexible as regards the contents.

\(\text{\textit{b. Discretionary powers of the courts}}\)

When winding up the marital property after a dissolution of the marriage the English courts, different from continental courts, have wide discretionary powers. Based on the law the courts may give both \textit{financial provision orders} and \textit{property adjustment orders}. They will seek to arrive at a fair solution without taking into account any title of ownership and contracts between the spouses, if any. Their discretionary powers are, however, not unrestricted: both the law and case-law give a number of directions, including that they must take account, when deciding on the relief to be given, of some specific circumstances mentioned in the law, of

\(^{10}\) In the opinion of a number of lawyers it is also not possible to agree to a completely new regime that one has drafted oneself.

\(^{11}\) One is free to opt for any statutory regime with an adaptation of non-mandatory rules.
which the welfare of minor children is a factor to be given the greatest weight. Moreover, the
courts must ascertain whether a *clean break* is possible.

In the continental systems the discretionary powers of the courts as regards the division of
the marriage-related property is considerably smaller. In Italy the courts may provide, in
derogation from the rule that the community of property must be divided in equal halves, that
either spouse will acquire a right of usufruct over part of the assets to be allotted to the other
spouse when this will be necessary for the maintenance and upbringing of the children. The
sole other discretionary power which vests in the courts when winding up the marriage-related
property has been considerably restricted by the *Corte di Cassazione*. This discretionary
power relates to the granting one of the spouses the right to live in the matrimonial home. The
*Corte di Cassazione* has now limited the freedom of the courts in the sense that they may
grant the right to live in the matrimonial home only to the weaker party, if the parental
authority over the minor children was given to such a party or the party co-habits with the
children of age who, for no fault of their own, are unable to provide in their own keep.

In the other continental systems the courts have wider discretionary powers as regards the
division of the divisible masse. In Germany such a discretionary power only\(^{12}\) extends to the
granting of the matrimonial home. The leeway given to the courts in this respect is however
quite broad. In the other systems the courts are granted, aside from a limited leeway in
granting the matrimonial home, the right to derogate in specific instances from the statutory
system or from the marriage contracts of the spouses.

E.g. French courts may grant a *prestation compensatoire* at the winding up of the
marriage-related property to either spouse at the expense of the other in order to bring into
balance the property rights of the former spouses. This normally applies not only when the
former spouses were married under the statutory regime but also when they were married with
a marriage contract. Such a *prestation compensatoire* is usually made, in practice, in the form
of a periodical payment and, in fact, hardly differs from maintenance payments in the other
studied systems.

In Sweden and Denmark the courts are granted several powers to safeguard a fair division,
one of which applies when the spouses were married under the statutory regime and the other
when the spouses entered into a marriage contract.

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\(^{12}\) One exception: in Germany the spouse who must pay a sum on account of an equalisation may refuse to
comply with a claim for equalisation when this would result in a gross unfairness. However, in case-law a claim
to this provision will only be successful in few cases.
Both in Denmark and Sweden the courts have, in certain circumstances, the powers to determine a division different from a division in equal halves, if it appears that the latter would have unreasonable consequences. In both countries this will be the case if one of the spouses will have contributed considerably more to the matrimonial community of property than the other, if the marriage has been of particularly brief duration and did not actually result in a financial community of property.

In Denmark and Sweden the courts may, in specific instances, also derogate from the marriage contracts of the parties. The courts only have such powers if the parties have excluded capital from the (deferred) matrimonial community of property. In Denmark the courts may only take such action in order to prevent any economic unreasonableness from arising. In Sweden the condition is that what the parties agreed was unreasonable. In Denmark the courts may derogate from marriage contracts by granting either spouse an amount to be paid by the other. In Sweden the courts may alter or disregard marriage contracts. Otherwise then Swedish courts, Danish courts may only proceed to a correction of marriage contracts if so requested by either spouse. In Sweden, however, very little use is made by courts of the aforementioned leeway, otherwise than by courts in Denmark.

English courts have been given the widest discretionary powers also during the marriage, e.g. the power to seek a reasonable and fair solution with regard to the matrimonial home (protection against legal acts of the spouse/owner) and the grant of an order for sale in the case of bankruptcy. In the other studied systems some freedom is also given to the courts in some specific instances, but this is not so great and, as mentioned, only applies in some instances (e.g. the powers granted to courts in all continental systems to give consent or to delegate the management and administration to the other spouse in the case of a refusal or the impossibility of one of the spouses to give the other consent for specific legal acts).

In conclusion, it may be stated that both during the marriage and at the division of the marriage-related property the English system is quite flexible, having regard to the powers of the courts. The flexibility of the other systems is specifically to be found in the freedom of the spouses to provide for their matrimonial property situation by marriage contract. However, also in a number of these systems the courts are either granted quite wide discretionary powers in a specific field (Germany: granting of the matrimonial home) or limited discretionary powers, in general (Denmark, France and Sweden).
Protection of the spouses

a. Protection of the spouses vis-à-vis each other

Protection of the spouses vis-à-vis each other. At the outset it must be stated that the best protection of the spouses vis-à-vis each other will be achieved by both being aware of the consequences of their marriage in respect of their property rights, which, however, is often not the case. The protection of the spouses vis-à-vis each other in the systems of matrimonial property rights is generally reflected by the protection of the divisible ‘masse’, in general and the protection of the living situation in particular. In most cases this protection is achieved by restricting the powers of the spouses to dispose of their property.

Protection of the living situation. The matrimonial home and the movable assets in the home are protected in all studied systems against the separate acts of a spouse. The manner and measure in which such protection is achieved differs, however, per system.

In England the spouse/non-legal owner is protected by granting a matrimonial home right. As a result, a spouse may not be put out of the matrimonial home without the court’s consent. Where the other studied systems are concerned, a distinction must be made between systems which explicitly and directly protect the living situation (Denmark, France, Sweden and Germany for assets which constitute household effects) and systems in which the protection of the matrimonial home is only achieved indirectly on the basis of the value of the property rights of such component (Germany and Italy). In the latter systems the protection of the living situation is linked to the protection of the divisible ‘masse’. Within the first mentioned category of systems a further distinction must be made between the countries where the restrictions in the right to dispose of property are mandatory law (England, France and Sweden) and systems where this is not so. Having regard to the interest of the living situation for the welfare of the family, the elected solutions in these systems (both an explicit and mandatory rule of protection) may be considered desirable.

Finally, it is to be observed that assets constituting household effects are not protected in Italy or in England. In these systems the financially weaker party will thus have less protection in this respect.

Protection of the divisible ‘masse’. During the marriage the English system provides the least protection to the divisible ‘masse’. Under English law each spouse, except in instances
in which one of the spouses has acquired an *interest* in the capital of the other, is free to
dispose of his or her capital without having to take the other spouse into account. In contrast
therewith, the most far going protection is achieved in the systems dealt with here where a
matrimonial community of property exists during the marriage. Both in France and in Italy
the spouses must jointly perform specific legal acts which could put the matrimonial
community of property at risk. In the Scandinavian systems and in Germany an intermediate
solution was chosen: if a spouse performs a legal act which his to the detriment of his or her
spouse, such legal act may be imputed to the first mentioned spouse after dissolution, so that
the divisible ‘masse’ must be composed as if the legal act had not taken place. In addition, a
spouse in Germany is protected because a spouse may not separately dispose of the entirety of
his or her capital, which results in such a spouse not having the right to alone dispose of a part
of the capital when this comprises more than 90% of his or her capital (or 85% in the case of
small capital).

Also in the period between the dissolution of the marriage and the ‘division’ of the
divisible ‘masse’, such marital property requires to be protected. Also in this case English law
provides the least protection. Protection may only be obtained by applying for a court order
whereby a spouse is enjoined from disposing of his or her capital in its entirety or in part,
which will not take place often. A little better protection is provided under the Scandinavian
systems where both spouses will, also after a dissolution of their marriage, remain entitled to
dispose of property which fell into the indivisible marital property from their side. This power
may be limited only by intervention of the courts, which is also the case in Germany. The
most fargoing protection in this case is also achieved in France and Italy where both spouses
must jointly perform all important transactions which relate to capital which forms part of
their undivided marital property. However, as the spouses will often not be willing to assist
each other in this period, this construction may cause problems.

In this connection it is of importance to keep in mind that in this period, after dissolution
of the marriage and prior to a ‘division’, manipulations of the capital may take place. This
will especially apply for Germany. For, under German law the accrual is established on the
date on which the divorce petition is lodged while the reference date for the existence of the
equalisation claim will coincide with the divorce. This will permit a spouse who must pay
equalisation to reduce his or her capital to the detriment of his or her spouse. This possibility
will be still greater as a result of the fact that the spouse who must pay equalisation cannot be
compelled to distribute more than will be at his or her disposal at the time when the claim
arises. This latter provision is decidedly unfavourable from a viewpoint of protection of the spouses vis-à-vis each other.

b. Protection of the spouses vis-à-vis third persons.

Protection of the spouses vis-à-vis third persons. This evaluation criterion may be regarded as supplemental to the foregoing. For, in order to achieve proper protection of the spouses vis-à-vis each other it will be necessary that a spouse will be entitled to claim vis-à-vis third parties that acts performed in breach of the rights of disposal are null and void. In addition, especially in systems with a matrimonial community of property, certain capital must be safeguarded during the marriage against the the other spouse’s creditors.

May the nullity of an act performed by a spouse without the right of disposal be opposed against third persons? Whether or not the nullity of an act performed contrary to the right of disposal may be opposed against third persons will depend on the restrictions in respect of the disposal in question. Where a spouse has disposed of the matrimonial home without consent in systems where such a consent is explicitly required, the act is null and void, in principle (France, Denmark, Germany as regards household effects and Sweden).

In Denmark and Sweden third persons in good faith are, however, protected, which is not the case in Germany and France. The latter two systems thus offer more protection to a spouse whose required consent was not asked or obtained, as the case may be.

If a spouse in Germany has disposed of the entirety of his or her capital without the other’s consent, such a legal act may be nullified. Such nullity may be opposed against third persons. The same applies in Italy if a spouse has performed an act of extraordinary management in respect of immovable property or movable registered assets without the other spouse’s consent. If, however, the act relates to other movable things, there will be an obligation to reinstate the community in its former position before the act, which may then be made by restitution and by payment of its equivalent.

Aside therefrom, in Germany, Denmark and Sweden there will be an obligation to pay compensation after the dissolution of the marriage for a spouse who during the marriage acted to the detriment of his or her spouse. However, if this will not vitiate the challenged legal act, there will be no question of protection vis-à-vis third persons.
**Right of recourse of creditors.** In systems without a matrimonial community of property during the marriage the capital of each spouse is safeguarded against recourse by creditors of the other spouse. With the exception of specific household debts there may be no recourse for debts of a spouse against the capital of the other spouse. In England and Sweden this protection is even greater as even the exception for household debts will not apply there. In systems without a matrimonial community of property a spouse will thus be protected against the creditor of the other.

In systems with a matrimonial community of property during the marriage (France and Italy) recourse is in principle possible against the matrimonial community of property for community debts contracted by one of the spouses separately. In Italy the private creditors of a spouse, however, have recourse only against the share of their debtor in the matrimonial community of property and only if the private capital will not be sufficient. In France, on the other hand, the private creditors of either spouse have recourse, in principle, against the entire community of property. The divisible ‘masse’ will thus not be protected in such instances, specifically in France. In Italy and France, however, the rule is also that the creditors of either spouse may not obtain recourse against the private capital of the other spouse. The independence of the spouses is still further protected because the creditors may have no recourse against specific capital which forms part of the divisible ‘masse’ of the other spouse, like the income from labour and the fruits from private capital. In France this protection is achieved by limiting the right of recourse of the creditors of a spouse while in Italy it was chosen to keep this capital during the marriage outside the matrimonial community of property and to only include what remains after dissolution as part of the divisible ‘masse’.

As regards specific risky acts, like the entry into a surety or a loan, French law also has protectory provisions: recourse for such debts may be made only against the matrimonial community of property when the other spouse had given consent thereto.

In conclusion, it may be stated that, as regards the protection of the spouses vis-à-vis the creditors of the other spouse, systems without a matrimonial community of property during the marriage in general provide the best protection as regards the creditors of the other spouse by the spouses each having a separate capital.

**Protection of third persons**

**Protection of third persons.** A review of the studied systems on the basis of the evaluation criterion ‘protection of third persons’ provides a mirror image of the evaluation considered
hereinbefore based on the criterion ‘protection of the spouses vis-à-vis third persons’. For, if the spouses are properly protected vis-à-vis third persons, the third persons will be equally less well protected vis-à-vis the spouses. An evaluation of the studied systems on the basis of this criterion therefore results in the opposite result: systems with a matrimonial community of property during the marriage (France and Italy) in general provide third persons with a better protection than the other studied systems. Of these two systems the French system protects third persons best, also in principle. In one respect spouses in France have a better protection, however, than third persons: within the framework of the protection of the family home. Where a spouse in France has disposed of the matrimonial home without the other’s consent, the third person is not protected even if he or she was in good faith. In Germany, moreover, the same will apply as regards household effects. In the preceding Paragraph we already dealt with this within the framework of the protection of spouses vis-à-vis third persons. Hereinafter we will still consider the publication of the matrimonial property situation of the spouses. For, also for the protection of the spouses, third persons as a rule are best protected by being properly informed.

**Publication of marriage contracts.** At the outset it should be stated that the issue of publication of contracts of the spouses does not play a role in England. Third persons are properly protected in England during the marriage as the marriage will not have any consequences, in principle, in respect of the property rights’ position of the spouses. After the dissolution the third persons may be faced, however, with a surprise if an adjustment of the capital of their debtor is made to the benefit of the other ex-spouse. This may be considered a negative aspect of this system.

In France and Italy the existence of marriage contracts is registered in the margin of the marriage certificate. In Denmark and Sweden marriage contracts must be registered at the district court which will ensure registration in a national register. This solution has the advantage that third persons need not be aware of the place of solemnisation of the marriage, which gives a better protection. In Germany marriage contracts must be registered in a number of Ländere in the Güterrechtsregister, which is seldom done.

In all continental systems the principle applies that the marriage contracts which were not published cannot be raised against third persons who may take it that the spouses were married under the statutory regime, which gives a proper protection. In Germany, however, a third person is not protected when such person was somehow aware of the existence of a marriage contract. The same applies in France where third persons will not be protected even
when the spouses did not comply with the obligation to publish their marriage contract, if the existence of the marriage contract was mentioned in the contract with a third person. For entrepreneurs stricter publication rules apply in France. A marriage contract of the spouse/entrepreneur must be recorded in the Commercial Register. When this is omitted the entrepreneur may not raise the marriage contracts against third parties with which he has professional dealings. The latter third persons, however, may invoke such marriage contracts and will, in such instance, enjoy a broader protection than the spouses.

As regards immovable property, third persons in all continental systems enjoy equal protection. Marriage contracts with regard to immovable property are registered in real estate registers in all continental legal systems.

**The ‘common core’**

**Common core.** The common core of the studied systems of matrimonial property law is not great. Although individual systems correspond in several areas, the contracts which have everything in common are scarce. The set objects are, however, to a great extent the same. One clearly sees that similar results can be achieved in this field of law with outwardly different provisions, otherwise than in other areas of family law. Thus similar considerations resulted in a number of systems in completely different regulations.¹³

The common core of the Danish, German, English, French, Italian and Swedish matrimonial property law is constituted by four elements. These derive either from the aim to provide for equality of the spouses or from a protection of the financially weaker party and/or the matrimonial home.

- All systems adhere to the principle of equality of the spouses, in principle. Especially in the provisions on the management and administration the equality and independence of the spouses is the foremost principle.

- The matrimonial home in all systems is protected, directly or indirectly, against acts of disposal by either spouse.

¹³ See Chapter Explanation.
- On the allotment of the matrimonial home to either spouse special importance is attached in all systems to the welfare of the children of the former spouses.

- Matrimonial property law or the statutory system, if any, protects or at least seeks to protect the financially weaker party when the marriage is dissolved.